

2013

A Bridge to the Practicing Bar of Foreign Nations: Online American Legal Studies Programs As Forums for the Rule of Law and As Pipelines to Bar-Qualifying L.L.M. Programs in the U.S.

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Recommended Citation

Van Detta, Jeffrey A. (2013) "A Bridge to the Practicing Bar of Foreign Nations: Online American Legal Studies Programs As Forums for the Rule of Law and As Pipelines to Bar-Qualifying L.L.M. Programs in the U.S.," *South Carolina Journal of International Law and Business*: Vol. 10 : Iss. 1 , Article 5.

Available at: <https://scholarcommons.sc.edu/scjilb/vol10/iss1/5>

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A BRIDGE TO THE PRACTICING BAR OF
FOREIGN NATIONS:
ONLINE AMERICAN LEGAL STUDIES
PROGRAMS AS FORUMS FOR THE RULE
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THE U.S.

*Jeffrey A. Van Detta**

INTRODUCTION

Sitting in Spirits, the lounge at the Hilton New Orleans Riverside, I discovered that the bright young woman working as the server that afternoon was, in fact, an attorney in her home country of Ukraine.¹ A throng of American law professors attending the January 2013 Annual Meeting of the Association of American Law Schools surrounded Antonina; but of all the law professors there, it was with me that she felt comfortable talking about her training and work in her home country. Antonina gave up her legal career when she decided it was best for her family to immigrate to America from the difficult conditions that lay just below the surface of her homeland in the post-Soviet era.² When she spoke of law, and

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¹ See generally Rosalind M. McInnes, *An International Conversation on Court Access in Ukraine*, COMM. LAW., July 2010, at 16 (describing the current conditions prevailing in the legal profession of Ukraine).

² See, e.g., Philip M. Nichols, *United States v. Lazarenko: The Trial and Conviction of Two Former Prime Ministers of Ukraine*, 2012 U. CHI. LEGAL F. 41; Hillary Rodham Clinton & Catherine Ashton, Op-Ed., *Ukraine's Troubling*

particularly of the study of law, her eyes glowed brightly, and her voice became animated.

Antonina had assumed that since our two legal systems were so different—ours, common-law and Anglo-American dominated; and Ukraine's, civil law and tradition³ dominated, emergent⁴ from the Soviet-era adaptation of the civil law tradition⁵—and because her legal education had been so different from an American legal education,⁶ that it was futile for her to seek bar admission in the U.S.⁷ Yet, there is a significant community of émigrés from Ukraine and other countries of Eastern Europe who need home-country trained lawyers admitted to practice in their adopted U.S. states.

Trends, INT'L HERALD TRIB., Oct. 25, 2012, available at http://www.nytimes.com/2012/10/25/opinion/hillary-clinton-catherine-ashton-ukraines-election.html?_r=0 (The *International Herald Tribune* was discontinued in mid-October and is now published as the *International New York Times*); David M. Herszenhorn, *Ukraine Government Plans to Charge Ex-Premier with Murder*, N.Y. TIMES, Jan. 13, 2013, at A5; G.C., *Ukrainian Politics: Plus ça Change . . .*, ECONOMIST, (Dec. 7, 2012, 4:18 PM), <http://www.economist.com/blogs/easternapproaches/2012/12/ukrainian-politics>.

³ See Myroslava Kryvonos, *A Research Guide to Ukrainian Law*, 31 INT'L J. LEGAL INFO. 1, 2 (2003) ("The Ukrainian legal system is very close to the Romano-Germanic legal family.").

⁴ See *id.* at 2–3.

⁵ See Olympiad S. Ioffe, *Soviet Law and Roman Law*, 62 B.U. L. REV. 701, 723–27 (1982); see generally Harold J. Berman, *The Challenge of Soviet Law*, 62 HARV. L. REV. 220 (1948); N.S. Timasheff, *Soviet Law*, 38 VA. L. REV. 871 (1952). One of the more remarkable features of Soviet law was that "Soviet judges are not bound by precedent and indeed it is prohibited by Soviet law for the lawyers to cite precedents." Harold J. Berman, *The Comparison of Soviet and American Law*, 34 IND. L.J. 559, 564 (1959). As a result, Soviet law was distinguished by "[t]he distinction between the development of law by analogy of previous decisions and the development by analogy of code provisions, statutes, and doctrine," which resulted in "the absence of a strong sense of the growth of law over time." *Id.*

⁶ See Lisa A. Granik, *Legal Education in Post-Soviet Russia and Ukraine*, 72 OR. L. REV. 963 (1993).

⁷ The "Legal Positions Wanted/Available" section of the Ukrainian American Bar Association's webpage evidences the challenge that Ukrainian immigrant lawyers face in finding a job at American law firms. See *Legal Positions Wanted/Available*, UKRAINIAN AM. B. ASS'N, <http://www.uaba.org/legalpositionswanted> (last visited Jan. 29, 2014).

Antonina was not the first foreign-educated lawyer I have met who has encountered the barriers faced by foreign-educated lawyers who come to America. Over the last 15 years, I have known individuals who previously practiced law in the Kurdish region of Iraq, Nigeria, Liberia, and Germany, among other places. My German acquaintance was a commercial lawyer in Frankfurt, held an LL.M. degree from a New Zealand university, and was working for the local office of a multi-national consortium of lawyers in his U.S. state of residence. Yet, to become authorized to practice law in the U.S. state of his residence, the bar admissions authorities sent him back to a local law school to take an undetermined number of courses, as he could fit them in around work. After completing various courses, he was required to go back to the bar admissions authorities to see when his bar application courses were satisfied so the bar would approve him for taking the state bar examination. One of those courses was my Contracts I course. He dutifully attended each class. After hearing of the process my German acquaintance had to go through, I could not help but be reminded of John Marshall Harlan II, who after studying law on a Rhodes Scholarship for three years at Oxford, went to work in a New York City law firm, but was compelled to attend New York Law School in the evening before the New York Bar Examiners would approve his application to take the state bar examination.⁸

The subject of foreign-educated lawyer admission to U.S. bars comes to me naturally. In a recent article, I explored the heightened obligations that the U.S. bears in the World Trade Organization (WTO) era to ease barriers of entry for foreign-educated lawyers, and how doing so will, in fact, increase work and opportunity for American lawyers, rather than introduce unwanted sources of competition.⁹ That article also explains how one-year, American

⁸ See, e.g., TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 15, 339 (1992); Norman Dorsen & Amelia Ames Newcomb, *John Marshall Harlan II, Associate Justice of the Supreme Court 1955–1971: Remembrances by His Law Clerks*, 27 J. SUP. CT. HIST. 138 (2002); Nathan Lewin, *Justice Harlan: The Full Measure of the Man*, 58 A.B.A. J. 579, 580–81 (1972). John E.F. Wood, *John M. Harlan As Seen By A Colleague In The Practice Of Law*, 85 Harv. L. Rev. 377, 377 (1971).

⁹ See Jeffrey A. Van Detta, *Transnational Legal Services in Globalized Economies: American Leadership, Not Mere Compliance, with GATS Through Qualifying LL.M. Degree Programs for Foreign-Educated Lawyers*

Legal Studies LL.M. programs can play a very important role in opening unfairly closed U.S. bars to competent foreign-educated lawyers.¹⁰

In this article, as a sequel to the above-mentioned article, I explore how online coursework for foreign-educated lawyers can help them assess whether seeking admission to the U.S. bar is right for them. I also discuss how online LL.M. programs allow foreign-educated lawyers to plan for the kind of sponsorship they will need from home-state law firms or businesses, or from multi-national law practices with U.S. offices, in order to sojourn in the U.S. to complete a bar-qualifying LL.M. degree and take a bar examination. Lastly, I address how these programs can, for foreign-educated lawyers who do not wish to seek U.S. bar admission, but do wish to learn from the American legal tradition, provide a unique—and potent—forum to assess important perspectives about the American conceptualization of the rule of law, and how those perspectives may contribute to developing the rule-of-law tradition in their own countries.

In Section II, I explore the barriers that foreign-educated lawyers face to U.S. bar admission. In that discussion, I suggest a different perspective: one that views welcoming foreign-educated lawyers into the U.S. as a means of substantially increasing work for the American bar by making it directly interconnected with the transnational provision of legal services by and for lawyers and clients worldwide. Section III considers the abiding need for a global dialogue devoted to promoting the adaptation of the rule of law through an uncensored, robust critique of the strengths and weaknesses presented in each legal system, including our own. This envisions a separate space in transnational legal dialogue, of eschewing hegemony in favor of dialogue between the American legal profession and the legal profession in countries across the globe. Section IV considers the steady, but slow, emergence of online course work in legal education, and the resistance it has met due to the stereotyping by bar leaders who have never experienced delivering or receiving online education. Moreover, this section considers the lack of online teaching experience of most American law professors and the irrational concern that online legal education

Seeking State-Bar Admissions, 13 HOFSTRA J. INT'L BUS. & L. (forthcoming Fall 2013).

¹⁰ *Id.*

will “compete with”—rather than complement and enhance—traditional classroom education in law school. In Section V, I consider how an American law school might structure an online program—a “global forum”—to cultivate a truly transnational dimension to legal cultures, and to create a bridge between the practicing bar of foreign nations to both their American counterparts and to American Legal Studies LL.M. programs at U.S. law schools.

I. A TALE OF TWO VISIONS: LEGAL ISOLATIONISM VERSUS LEGAL TRANSNATIONALISM

Antonina’s example symbolizes the degree of continued insularity of the American legal profession and the difficulties facing foreign-educated lawyers who could do great things for both America and their home countries. That insularity produces two ills.

First, the entry barriers for foreign-educated lawyers in the U.S. are indefensibly high, and are based on the economics of the guild, rather than on the 21st century globalized economy in services. This harms both foreign and American lawyers by reducing the kind of flow in legal services that attends the flow of other globalized trade. For America to opt its lawyers out of this opportunity is indescribably shortsighted. America’s practicing bar needs to globalize if it is to grow; however, globalization is not without concerns. Perhaps the most controversial issue that globalized law practice presents is opening U.S. state bar admission to foreign-educated lawyers admitted to practice law in their home countries. The fear of competition from these lawyers has traditionally inspired a protectionist response from the organized bar.¹¹ Thus, resistance to that idea remains substantial in the U.S., even though it was once fierce. Almost twenty years of the General Agreement on Trade in Services (GATS)¹² treaty and other multi-lateral trade negotiations to reduce barriers in cross-border services—including legal services—

¹¹ See Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality Of Admission Rules For Out-Of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 144–150 (2004).

¹² General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS].

have forced various stakeholders in U.S. state and federal law practice to rethink intransigence. Recently, legal leaders have realized that business for the American legal services sector can grow by opening American law practice to more foreign-educated lawyers, and can thereby place the American market squarely in the stream of global commerce into which just about every other American business sector has entered.¹³ American bar leaders who have gained these insights have observed that “U.S. lawyers are going to have to be part of the global economy and international legal industry, or they won’t survive.”¹⁴ As a recent *ABA Journal* article observed:

¹³ *Barriers to Entry in the Legal Profession: Not Enough Lawyers? Lawyers Keep Their Numbers Carefully Pruned, Pushing up Costs*, ECONOMIST, Sept. 3 2011, at 28–29. See, e.g., Van Detta, *supra* note 9; see also Memorandum from Peter D. Ehrenhaft, Esq., to the U.S. Trade Rep., (Jan. 13, 2012), available at http://www.gbdinc.org/PDFs/TPP_Ehrenhaft_Comments_re_Mexico_and_Japan_Jan_13_2012.pdf (discussing sub-national regulation of the U.S. legal profession). As Mr. Ehrenhaft succinctly observed:

US trade agreements have traditionally expressed commitments of the national governments that negotiate and sign them. All of our free trade agreements of the United States beginning with the NAFTA, include provisions exempting existing State laws from complying with national treatment, most favored nation treatment, and other similar key obligations of the agreements without the specific consent of the affected individual States. While there have been some such consents negotiated in the context of the Government Procurement Agreement, there have been no such consents with regard to the professions generally or legal services in particular.

Id. at 4 (footnotes omitted).

¹⁴ Meredith Hobbs, *Ideas Follow Linda Klein after Heading ABA House of Delegates*, DAILY REP. (Aug. 17, 2012), <http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202567779725>. See also Cary Bertolet, *International Lawyers Admission to the United States*, LAURENCE SIMONS INT’L LEGAL & COMPLIANCE RECRUITMENT, <http://www.laurencesimons.com/international-lawyers-admission-to-the-united-states> (last visited Jan. 28, 2014); see generally RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 2 (2000) (“In order to become a lawyer and qualify to practice law in a jurisdiction of admission, a prospective lawyer must comply with requirements of the jurisdiction relating to such matters as education”); *Id.* at cmt. c (noting that “[m]ost states now require a minimum of an

undergraduate degree from an accredited college as well as a degree from an approved law school[.]” and that “[a]pproved law schools are defined in the great majority of states as *only* those accredited by the American Bar Association.”) (emphasis added). *In re Bar Admission of Altshuler*, 490 N.W.2d 1 (Wis. 1992), epitomizes this phenomenon. In that case, an Israeli-trained lawyer who earned an LL.M. degree from the University of Chicago, and who possessed detailed letters evaluating the equivalency of her legal education and supporting her application to sit for the Wisconsin bar from luminaries ranging from Judge Richard Posner to the Dean of the University of Chicago Law School, was nonetheless denied a waiver by the Wisconsin Board of Bar Examiners due to the requirement that all those who sit for the Wisconsin bar examination have earned a first degree in law from a law school approved by the American Bar Association. *See id.* at 1–6. As an exasperated Justice Shirley S. Abrahamson wrote in dissent, joined by Justice Bablitch, the “rules keeping foreign-trained individuals from access to state bar examinations are too narrow and rigid; they are not suited to the global economy in which we now live.” *Id.* at 9 (Abrahamson, J., dissenting). More pointedly, Justice Abrahamson offered a highly critical view of an all-too-common exclusionary approach taken by state bar examiners:

I believe that the Board's decision in this case amounts to a failure to conduct an individualized assessment and a refusal to grant a waiver of the ABA-approved degree requirement to any foreign-trained lawyers. Statements in the Decision on Remand referring to the applicant's educational experiences are incomplete. I believe that only one reasonable conclusion is possible from this record: Ms. Altshuler has presented an exceptional case and good cause and denying her access to the bar examination is unjust. If Ms. Altshuler is denied admission to the Wisconsin bar examination, I do not see how any graduate of a law school located outside this country can be found eligible. Accordingly I conclude that the Board's decision constitutes an abuse of discretion.

Id. Cf., e.g., Mark Stevens, *Cross-Border Licensure: Admissions Process for American Lawyers in England, Australia, and Hong Kong*, 82 MICH. B.J., July 2003, at 20, 21 (“The idea of living and practicing law overseas can be an attractive one, but it sounds hopelessly impractical. . . . [Yet,] it has become increasingly easy, as well as common, for lawyers to be licensed [in countries outside of the United States] to practice in foreign jurisdictions.”). For example, as Mr. Stevens points out, for “[t]hose of us who have endured the Byzantine complexities of a state bar admission process and the burdensome details of the National Board of Law Examiners forms will be

In today's global economy, [domestic barriers to transnational law practice] are becoming increasingly common for lawyers following clients and business opportunities around the world. U.S. law firms face an increasingly competitive—and often protectionist—legal environment when they seek to extend their operations overseas. This environment also is raising new questions about how lawyers should be regulated outside their home jurisdictions.

“Globally, major markets are opening up. The outside world is banging at the doors of just about every country in the world,” says Glenn P. Hendrix, managing partner at Arnall Golden Gregory in Atlanta and chair of the ABA Task Force on International Trade in Legal Services.

“The question is, how does the local legal profession respond?” says Hendrix, a past chair of the ABA Section of International Law. “Every country is asking the big questions: ‘Is globalization a threat or an opportunity? If we liberalize rules of practice for foreign lawyers, does it help or hurt us?’”¹⁵

The New York Bar has had the nation beat in perspicacity. Since the 1970s, the New York Bar has opened its doors to foreign-educated lawyers in a variety of ways. One of its most successful innovations is in its long history of allowing an American-earned LL.M. degree to qualify foreign-educated lawyers for the state's bar examination. In April 2011, New York issued specific, heightened standards that a program, in which a foreign-educated lawyer earns an LL.M. degree, must satisfy in order for New York Bar Examiners to consider the LL.M. degree as qualifying.¹⁶ In March 2011, the

pleasantly surprised by the simplicity of applying for admission to the law society” in England and Wales. *Id.*

¹⁵ Anna Stolley Persky, *The New World: Despite Globalization of the Economy, Lawyers are Finding New Barriers to Practicing on Foreign Soil*, 97 A.B.A. J., Nov. 2011, at 34, 34–36.

¹⁶ See, e.g., *New York Changes LL.M. Requirements for Foreign Lawyers to Sit State Bar: New Curriculum Sets New Conditions for LL.M. Programs that Make Lawyers Eligible*, LLM GUIDE (May 27, 2011), <http://www.llm-guide.com/article/597/new-york-changes-llm-requirements->

ABA Section of Legal Education and Admissions to the Bar approved for notice and comment a proposed Model Rule for using LL.M. degrees as a bar examination qualification standard for foreign-educated lawyers. This Model Rule was accompanied by a set of proposed Criteria by which American law schools could construct a ground-based LL.M. program in American legal studies that the Section Council would certify as meeting the Model Rule's requirements to qualify foreign-educated lawyers to sit for a state bar examinations.¹⁷

Second, by holding back foreign-lawyer access to American legal services markets, we hamper the quid pro quo of the export of one of America's most enduring contributions—American law. It is

for-foreign-lawyers-to-sit-state-bar. The New York Board of Bar Examiners treats the attainment of an LL.M. at an ABA-approved law school in the United States as a “curative” for a foreign-educated lawyer whose prior law studies are not found to be qualifying for the New York Bar Examination:

An applicant, whether educated in a Common Law or non-common law country, whose legal education is not of sufficient duration or not substantively equivalent to an ABA-approved law school program, may cure the durational or substantive deficiency (but not both). On April 27, 2011, the New York Court of Appeals amended Rule 520.6 (b). [http://www.nybarexam.org/Docs/Amended_Rule_520.6_April27_2011.pdf]. Most provisions of the amended Rule do not apply to programs in effect **prior** to the 2012-2013 academic year. The following is a synopsis of how the Board of Law Examiners interprets and applies the “cure provision” for (1) programs completed or commenced prior to the 2012-2013 academic year and (2) programs commencing in the 2012–2013 academic year.

Foreign Legal Education, N.Y. ST. BOARD LAW EXAMINERS, <http://www.nybarexam.org/Foreign/ForeignLegalEducation.htm> (last visited Jan. 29, 2014) (citation omitted). The forward-looking amendment to Rule 520.6 is summarized as follows: “Applicants enrolled in a program commencing in the 2012–2013 academic may cure the durational or substantive deficiency (but not both) by obtaining an LL.M. degree (Master of Law) at an ABA-approved law school in the United States.” *Id.*

¹⁷ See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT 4–7 (2011), available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20110420_model_rule_and_criteria_foreign_lawyers.authcheckdam.pdf.

to law that America has made its most enduring contributions on the world stage. Two hundred thirty-eight years of unique conditions have allowed *Lex Americana*¹⁸ to flourish.¹⁹ However, America's efforts in sending bar association, academic, and judicial delegations to developing nations have had sporadic, and admittedly ineffectual, results at best.²⁰ This approach is known as "law and development," and it "is built on the assumption that American law can be exported abroad to catalyze foreign legal development."²¹ While having yielded only a "dismal record," the approach "has remained

¹⁸ *Lex Americana* is Latin for "American law."

¹⁹ Jonathan A. Bush, *Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 ST. LOUIS U. L.J. 515 (2001) (discussing the American prosecutors' contributions to the understanding of due process in the context of the Nuremberg War Crimes Trials); Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L. ECON. L. 179 (1999) (describing the influence and role that U.S. jurisprudence plays in other countries). While some have seen fit to use the phrase *Lex Americana* as a pejorative and to equate it with legal imperialism, see, e.g., Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321, 330–36 (2001) (ruminating about backlashes against the prospect of *Lex Americana* spreading globally); Herbert R. Reginbogin, *Litigating Genocide of the Past*, 32 LOY. L.A. INT'L & COMP. L. REV. 83, 90–91 (2010), the resilience of American law and the interest it engages globally refutes those academics who appear to suffer from the phenomenon, articulated by comic actor Groucho Marx, of not wanting to be a member of any club that would have them as a member.

²⁰ Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 VAND. J. TRANSNAT'L L. 477, 477 (2012). Dr. Kroncke offers China as one of many examples:

From the 1970s until today, perhaps the most consistent object of American law and development work has been China. In the mid-1970s, China began to welcome American lawyers within its borders as it sought to increase its economic dynamism. Quickly, law and development became the cornerstone of Sino-American relations in law. Yet, here again in every subsequent decade, reports are produced that lament the inefficacy of such efforts in shaping Chinese legal reforms, and these reports recycle the historical package of law and development criticisms.

Id. at 495 (footnotes omitted).

²¹ *Id.* at 477.

paradoxically popular while the field remains locked in repeating cycles of failure and optimism.”²²

A more sensible approach is to make American legal culture accessible to the rank-and-file of civil servants, practicing attorneys, first-level judges, and others with an interest in law.²³ The way to increase accessibility is through group interaction and conversation via the greatest social network ever devised: the Internet. By allowing a broad cross-section of legal professionals in other countries to consider American law as part of a variety of influences, and within the context of their own cultures, an online forum to access learning and dialogue about American law avoids the heavy-handed—and persistently unsuccessful—nature of prior efforts that emphasize American models for adoption.²⁴

²² *Id.*

²³ See Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511 (2009).

²⁴ See, e.g., James E. Moliterno, *Exporting American Legal Ethics*, 43 AKRON L. REV. 769 (2010). The results of traditional, models-for-adoption approaches lead to the worst of unintended consequences:

[T]he main court [of Armenia] is now about to begin operating as a common law court. But no one, including the lawyer for the government in the constitutional court, could seem to explain why. In Tbilisi, Georgia, . . . the new judicial ethics law, modeled on the ABA Model Code of Judicial Conduct, is being used as a tool of government control over the judiciary. This is certainly not the result that was desired or anticipated by the advocates of the new code's adoption. But when too little attention is paid to local culture, mere adoption of excellent words in codes can have deleterious results.

The large-scale adoption of U.S. models of lawyer and judge regulation outside the United States is likely to produce unfortunate results. The U.S. lawyer regulation system has much to recommend it, but it has serious flaws, and more importantly for this purpose, it has no real relationship with lawyer culture outside the United States.

Id. at 770 (footnotes omitted).

II. ENVISIONING A GLOBAL DIALOGUE DEVOTED TO PROMOTING A SUCCESSFUL, ENDURING ADAPTATION OF THE RULE OF LAW CONCEPT

A. PROLOGUE

An online American Legal Studies LL.M. program presents a revolutionary opportunity to bring one of America's most compelling legal exports—the American vision of the rule of law—to an exceptionally large audience of foreign attorneys and others interested in the legal system of their respective nations.

B. RECONCEPTUALIZING THE RULE OF LAW: SHIFTING THE PARADIGM FROM “OUR WAY” TO “A FREE AND OPEN DISCUSSION OF WHAT THE AMERICAN LEGAL EXPERIENCE OFFERS FOREIGN-EDUCATED ATTORNEYS TO ASSIST THEM IN REFLECTING ON THE RULE OF LAW” CONCEPT

The phrase, “rule of law,” has become a prominent part of the modern discourse in political and international affairs.²⁵ Yet, when invoking that phrase in an international chorus of near-unanimity, speakers and writers do not often agree on its definition.²⁶ Indeed, defining the rule of law in a principled way has proven very challenging.²⁷ As one recent commentary observed, “[t]he Rule of Law is a venerable concept, but, on closer inspection, it is a complex admixture of positive assumptions, inchoate political and legal

²⁵ See MARTIN KRYGIER, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?*, in GETTING TO THE RULE OF LAW 64 (James E. Fleming ed., 2011).

²⁶ See Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 U. PITT. L. REV. 191 (2010); Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1455–57 (2010); see also James A. Noe, *Defining the Rule of Law*, EXPERIENCE, Spring 2005, at 5; Peggy Probasco, *Defining the Rule of Law . . . and Your Place in Carrying it out Near and Far*, MONT. LAW., Apr. 2007, at 4.

²⁷ See, e.g., Kevin T. Jackson, *The Normative Logic of Global Economic Governance: In Pursuit of Non-Instrumental Justification for the Rule of Law and Human Rights*, 22 MINN. J. INT'L L. 71, 101–15 (2013).

theory, and occasionally wishful thinking.”²⁸ This mixture can be described in a variety of ways:

Reformers, and many scholars, insist that the rule of law . . . is an unalloyed good, promoting and safeguarding values that are intrinsically desirable, such as economic development and social progress. Political and legal theorists identify the rule of law as essential to a justice-seeking polity. This connection is frequently seen as grounded in democracy, human freedom, equality, justice, economic well-being, national identity, or, as with Lon Fuller, in the “inner morality” of law. In the oft-stated dichotomy, a polity must be ruled by law or else by men. It is said that where the rule of law is absent, we cannot govern the governors, and thus we are subject to official prerogative, which may be arbitrary, capricious, and brutal.²⁹

The very nature of the rule of law concept is invested with such indeterminacy that one might very well see it as a kind of cultural Rorschach test³⁰—“its attractiveness may stem mainly from its imprecision, which allows each of us to project our own sense of the ideal government onto the phrase ‘rule of law.’”³¹

Self-conscious efforts to export the rule of law as an American concept have not born the hoped-for fruit. Indeed, those efforts

²⁸ Rodriguez et al., *supra* note 26, at 1455.

²⁹ *Id.* at 1457 (footnotes omitted).

³⁰ A Rorschach test is a personality and intelligence test used by psychiatrists in which a person looks at ink blots and then describes what the shapes look like. See Thomas B. Nachbar, *Defining the Rule of Law Problem*, 12 GREEN BAG 2D 303, 303–04 (2009) (noting that while “‘rule of law’ is an inherently vague term meaning different things to different people,” its “inherent indeterminacy has not deterred many who have attempted to define what the rule of law is in the course of academic debate, the development of military doctrine, and practical application.”). Professor Nachbar goes on to observe that “[w]hat unites most of these efforts (even those by scholars) is that they seek a definition of the rule of law not as an abstract exercise but to further some concrete effort, be it military, diplomatic, political, or developmental.” *Id.* at 304.

³¹ Rodriguez et al., *supra* note 26, at 1458 (footnotes omitted).

sometimes have been viewed as providing a form of discourse that repressive governments employed to clothe their excesses in legitimacy,³² and they often become perceived as cultural imperialism.³³ For example, Rwanda's President, Paul Kagame,³⁴ echoed this viewpoint in remarks he delivered in September 2013: "Justice is an essential part of building a nation and ensuring every citizen is equal before the law. Every nation, rich or poor, has the ability to respect justice. *No country should claim to have monopoly over the understanding of principles of justice.*"³⁵ Indeed, American commentators³⁶ and other foreign leaders have recognized the same thing.³⁷ Recently, the *New York Times* published an Op-Ed piece

³² See, e.g., Morton J. Horowitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 564-66 (1977) (reviewing E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975)). Recently, a number of books have taken up the misuse of the "rule of law" concept in the service of lawlessness; see generally DESMOND MANDERSON, KANGAROO COURTS AND THE RULE OF LAW: THE LEGACY OF MODERNISM (2012); UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL (2008); JOTHIE RAJAH, AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE, AND LEGITIMACY IN SINGAPORE (2012).

³³ See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 2 (1997) ("Indeed, many invocations of the Rule of Law are smug or hortatory. Within the twentieth century, however, references to the Rule of Law have increasingly acquired either defensive or accusatory tones.") (footnote omitted).

³⁴ See generally Jeffrey Gettleman, *The Conscience of a Strongman*, N.Y. TIMES, Sept. 8, 2013 (Magazine), at MM38.

³⁵ *Every Nation, Rich or Poor, has the Ability to Uphold Rights of All Citizens*, OFF. PRESIDENT (Sept. 6, 2013), <http://www.presidency.gov.rw/component/content/article/1-latest-news/909-every-nation-rich-or-poor-has-the-ability-to-uphold-rights-of-all-citizens> (emphasis added). See also *President Kagame Opens 2013-2014 Judicial Year Calling on Judiciary to Focus on Crimes Related to Genocide Ideology, Human Trafficking, Corruption*, REPUBLIC RWANDA (Sept. 6, 2013), <http://www.gov.rw/President-Kagame-opens-2013-2014-judicial-year-calling-on-justice-sector-to-focus-on-crimes-related-to-genocide-ideology-human-trafficking-corruption>.

³⁶ See, e.g., Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

³⁷ See, e.g., James E. Moliterno, *Exporting American Legal Education*, 58 J. LEGAL EDUC. 274, 278 (2008) ("[S]hifts to U.S. models do not always fit well with local conditions," and thus American legal educators who engage with foreign lawyers and law students are well-advised to pay "attention to this possibility, rather than merely assuming that the U.S. model must fit all . . .").

under the name of Vladimir Putin, President of the Russian Federation, which in part commented on an address President Barak Obama made on live national television:

I would rather disagree with a case he made on American exceptionalism, stating that the United States' policy is "what makes America different. It's what makes us exceptional." It is extremely dangerous to encourage people to see themselves as exceptional, whatever the motivation. There are big countries and small countries, rich and poor, those with long democratic traditions and those still finding their way to democracy. Their policies differ, too. We are all different, but when we ask for the Lord's blessings, we must not forget that God created us equal.³⁸

Whatever one may think of this commentary issued in President Putin's name,³⁹ it serves to drive home the point that the global community has grown weary of a rule of law message founded on a nation's claim that its specific realization of the rule of law is the *vade mecum* for all nations.⁴⁰ Messages framed in that way may actually do more to harm the rule of law than to promote it. In the same Op-Ed, President Putin reflects, "we were also allies once, and defeated the Nazis together."⁴¹ One might also remind President Putin that we also prosecuted the Nazi leaders together at the famous

³⁸ Vladimir V. Putin, Op-Ed, *A Plea for Caution from Russia*, N.Y. TIMES, Sept. 12, 2013, at A31.

³⁹ The authorship of and editorial decision to publish President Putin's Op-Ed is explored in detail in Margaret Sullivan, *The Story Behind the Putin Op-Ed Article in the Times*, N.Y. TIMES (Sept. 12, 2013, 11:11 AM) <http://publiceditor.blogs.nytimes.com/2013/09/12/the-story-behind-the-putin-op-ed-article-in-the-times/>. See also Alec Luhn & Adam Gabbatt, *Vladimir Putin Wrote 'Basic Content' of New York Times Op-Ed, Spokesman Says*, THE GUARDIAN (U.K.) (Sept. 12, 2013, 5:43 PM), <http://www.theguardian.com/world/2013/sep/12/putin-op-ed-author-ketchum-nyt>.

⁴⁰ Moreover, there have been some strong internal critiques of the American conceptualization of "the rule of law." See, e.g., Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2102-04 (1989).

⁴¹ Putin, *supra* note 38.

1945 Nuremberg War Crimes Trials.⁴² There, Russia partnered with the U.S., Great Britain, and France to define the rule of law's essence that transcends all of the multifold struggles to define the phrase coherently: "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason."⁴³ Robert H. Jackson's memorable sentence distills with succinct clarity the expression of the rule of law concept in a way that informs all efforts to define the rule of law.⁴⁴ Russia's full engagement with, and participation in, the Tribunal evoked much partisan criticism at the time,⁴⁵ and it continues to do so in the West still today.⁴⁶ Yet, the

⁴² See Craig Bruce Smith, *The Nuremberg War Crimes Trials*, in 3 THE ENCYCLOPEDIA OF WAR 1574–80 (Gordon Martel ed., 2012). See generally Francis Biddle, *The Nurnberg Trial*, 33 VA. L. REV. 679 (1947) [hereinafter *Nurnberg Trial*] (describing the Nuremberg Trial from the author's point of view, who was one of the American judges on the tribunal).

⁴³ *Nurnberg Trial*, *supra* note 42, at 681 (citation omitted).

⁴⁴ See Jeffrey D. Hockett, *Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial*, 1990 SUP. CT. REV. 257, 277–78; see also Tara Helfman, *Francis Biddle and the Nuremberg Legacy: Waking the Human Conscience*, 15 J. JURISPRUDENCE 353, 358–60 (2012). See generally Henry T. King, Jr., *Remarks*, 27 CARDOZO L. REV. 1553 (2006).

⁴⁵ FRANCIS BIDDLE, IN BRIEF AUTHORITY 413 (1976). In another forum, Judge Biddle elaborated on his criticism of the Soviets as follows:

The Russian idea of cross-examination was to read a long incriminating question and then expect the defendant to admit everything The Russians were used to co-operation from a defendant in their own country, and were rather put out It was not to be expected that they would understand our [judicial] practice when the purposes of their trials were so different. The Russian trial must conform to the policy of the state, not oppose it.

Francis Biddle, *Nuremberg: The Fall of the Supermen*, AM. HERITAGE MAG., Aug. 1962, available at <http://www.americanheritage.com/content/nuremberg-fall-supermen>. Biddle's anecdote from outside the Nuremberg courtrooms provides a metaphor for the American view of the Russian approach to the rule of law in 1946:

Perhaps no incident better illustrated the Russian attitude toward the trial than one that occurred early in 1946. It seemed that important visitors were constantly arriving in Nuremberg, among them the Soviet delegate

Russian participation in the greatest exercise in the rule of law in recorded history demonstrates that, despite even stark differences in

to the United Nations (and onetime prosecutor in Stalin's infamous purge trials), Andrei Vishinsky.

Jackson gave him a large dinner at the Grand Hotel. After the usual flow of speeches and liquor, Vishinsky rose to his feet, genial, faintly bibulous, expansive. Vodka, he said, was the enemy of man, and should therefore be consumed. He wanted to propose a toast. He raised his glass, and we got up; and now he spoke very fast, so that it was hard to follow the interpreter: "To the German prisoners, may they all be hanged!" The judges, not quite taking in what he said, touched their lips to the champagne. But it did not take long for them to realize what they had done.

Id. But see, e.g., Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 A.B.A. J. 813, 816, 881 (1949) (discussing different perspectives brought to negotiations of the Statute of the International Military Tribunal by the Russian delegate, Andrei Vyshinskii, attributable to fundamental differences in national history, culture, and legal traditions).

⁴⁶ See Francine Hirsch, *The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order*, 113 AM. HIST. REV. 701, 701-02 (2008); cf. Melissa S. McHugh, *The Legacy of International Cooperation at the Nuremberg Trials*, 3 [No. 10] STUDENT PULSE 3 (2011), <http://www.studentpulse.com/articles/580/the-legacy-of-international-cooperation-at-the-nuremberg-trials>. As Professor Hirsch has pointed out:

For politicians and historians who helped create the classic narrative of Nuremberg, the role of the Soviets in the International Military Tribunal (IMT) was, and remains, an awkward fact. Most English-language accounts describe Soviet participation in Nuremberg as "the Achilles' heel" of the trials: regrettable but unavoidable, a Faustian bargain that the U.S. and Britain made in order to bring closure to the war and bring the Nazis to justice. Popular works that have shaped conventional wisdom about the trials give little attention to the substantive role that the Soviets had in all aspects of the IMT. Those commentators who do focus on Soviet participation often do so in order to highlight the flaws of such tribunals and to make a point about "victors' justice," in the most extreme cases as part of a larger project to discredit the historical record of the Holocaust.

Hirsch, *supra* (footnotes omitted).

legal philosophy and legal approach,⁴⁷ lawyers from very different nations can share sufficient common-ground in understanding the rule of law to learn from one another in dialogue:

A new narrative of Nuremberg that includes a full accounting of the role of the Soviets contains numerous twists and turns—and more than a few surprises. First, there is compelling evidence that the Soviet Union made significant contributions to the legal framework of the [Nuremberg Tribunal] and also to a new postwar vision of international law. It did so despite the fact that Soviet domestic legal practices contradicted Western liberal principles of the law.⁴⁸

Now, lest it be thought that the author is a Pollyanna,⁴⁹ vulnerable to the manipulation of legal history and the spin of high-

⁴⁷ Hirsch, *supra* note 46, at 703; *see also* Jackson, *supra* note 45.

⁴⁸ Hirsch, *supra* note 46, at 703; *see also* JOHN QUIGLEY, *SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD* (2007). While “[t]he demise of the Soviet Union was viewed in the West as a defeat of everything the Soviet Union had espoused.” *Id.* at 175. “Despite the failure of the USSR to maintain itself, the concepts the Soviet government had injected into political dialogue remained very much a part of the discussion of social policy.” QUIGLEY, *supra*. These observations lead Professor Quigley to conclude the following:

Western law at the turn of the twenty-first century had changed sharply from Western law at the turn of the twentieth. Much of what is viewed as “modern” in the law first appeared, in the form of ideas and in the form of legislated law, in Soviet Russia.

....

When one has declared victory over an enemy, it is not popular to acknowledge that we may have been influenced by the enemy. Despite its rejection of Soviet concepts, the West absorbed many of them. Before the seventy Soviet years had run their course, the world had changed. And that change was, in some measure, in response to the ideas of the Soviets.

Id. at 192.

⁴⁹ For millennials who may not be familiar with the term, referring to someone as a “Pollyanna” indicates that s/he is an insufferable optimist, much like the eponymous heroine of Eleanor Porter’s 1913 novel. *See Pollyanna: Spirit of Optimism Born Out of War*, NPR WEEKEND EDITION

priced consulting firms, the reality of Russia's "official" perception of the rule of law does not stand up to the reality of how that system is being experienced by Russians, or how it is being assessed by a wide spectrum of international experts and observers.⁵⁰ Indeed, the state of Russia's rule of law has recently been described by the International Bar Association in terms of great concern: Although "Russia's engagement with the OECD [Organisation for Economic Co-operation and Development] and WTO [World Trade Organization] means rule of law reform should be imminent," that view must be tempered by reality because "the worst excesses of government control and human rights abuses suggest otherwise."⁵¹ Yet, Russian law students of the 21st century seem engaged and committed to a profession that promotes the rule of law both within itself as well as within its nation.⁵²

Simply put, if the U.S. is to promote the rule of law with the best approach, we will do so not by finding the comparative shortcomings in other national legal systems, which is a relatively easy task,⁵³ but

Jan. 27, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=18456177>.

⁵⁰ See, e.g., Kathryn Hendley, *The Puzzling Non-Consequences of Societal Distrust of Courts: Explaining the Use of Russian Courts*, 45 CORNELL INT'L L.J. 517 (2012); Polina Levina, *Links Between Criminal Justice Procedure and Torture: Learning from Russia*, 16 NEW CRIM. L. REV. 104 (2013); Sarah E. Cox, Note, *Reverse Revolution: Russia's Constitutional Crisis*, 22 PAC. RIM L. & POL'Y J. 179 (2013); Rebecca Favret, Comment, *Back to the Bad Old Days: President Putin's Hold on Free Speech in the Russian Federation*, 12 RICH. J. GLOBAL L. & BUS. 299 (2013); Ruth Green, *Russia: Reforming or Unraveling?*, IBA GLOBAL INSIGHT MAG., June–July 2013, at 40.

⁵¹ Green, *supra* note 50.

⁵² See, e.g., Philip M. Genty, *Dichotomy No Longer? The Role of the Private Business Sector in Educating the Future Russian Legal Professions*, 40 FORDHAM URB. L.J. 283, 292 (2012) (describing a lecture the author delivered on legal writing and legal ethics in Moscow on "a Saturday morning" and remarking that "[a]lthough the session took place at 9:00 a.m. and was purely voluntary, the response was extraordinary—one hundred students attended" and participated with vigor, even with the author conducting the session in English).

⁵³ As it is with respect to trial by jury, which was first introduced into the Russian court system during the reign of Tsar Alexander II, in 1864, and continued until the "'Decree on Courts (No. 1)' in 1917." Gennady Esakov, *The Russian Criminal Jury: Recent Developments, Practice, and Current*

rather by promoting dialogue about the strengths and opportunities that each national legal system presents in an atmosphere of transparency and candor.⁵⁴ Thus, what is truly significant in the

Problems, 60 AM. J. COMP. L. 665, 667, 669 (2012). Unnoted by many non-Russians, the jury court was “a highly developed and respected element of pre-1917 Russian society” and was integral to “stories and novels by famous Russian writers, such as Fyodor Dostoevsky (*The Brothers Karamazov* (1880)), Count Lev Tolstoy (*Resurrection* (1899)), and especially Anton Chekhov, who was often a juror or senior juror (e.g., *The Shooting Party* (1884), *The Strong Feelings* (1886), and *In the Court* (1886)).” *Id.* at 668. The jury court was later re-introduced in stages throughout Russia between 1989 and 2010. *See id.* at 670. Yet critics outside of Russia have sometimes sat in harsh judgment of the Russian jury court as it has been reconstituted:

Often the jury is portrayed in very negative terms: we are constantly reminded of the high rate of reversed acquittals, the active roles of the prosecutor and presiding judge, the small number of jury trials, its limited jurisdiction, etc. Yet, this is the wrong approach. *The jury in Russia should not be assessed from the point of view of a Western, especially Anglo-American, observer.* An observer educated in a stable society with a long standing tradition of the rule of law, impartiality of justice, and “trial by neighbors” is *not able to grasp the social, legal, and cultural difficulties in the transition from a Soviet-style criminal justice system. In such an environment, an all or nothing approach makes little sense.* The criminal jury has been in place (again) in Russia for only about two decades by now, and it should be remembered that, “[t]rial by jury is probably the privilege of a stable society. It must be stable in the economic, social, political, and legal respects. In the opposite case, trial by jury is doomed to live out a miserable existence.” In pre-1917 Russia, we had fifty-three years to create the jury; the common law system has had at least eight centuries.

Id. at 700–01 (emphasis added) (footnotes omitted).

⁵⁴ *See, e.g.*, LAURA GRENFELL, PROMOTING THE RULE OF LAW IN POST-CONFLICT STATES 26 (2013) (noting criticism that “rule-of-law aid providers are responsible for a form of Western imperialism” because “they do not have much interest in non-Western forms of law, in traditional systems of justice, or, in the case of some American rule-of-law experts, even in civil law,” and because “[a]id providers know what endpoint they would like to help countries achieve—the Western-style, rule-oriented systems they know from their own countries” (quoting CARNEGIE ENDOWMENT FOR INT’L PEACE, PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE

Putin Op-Ed story is not Putin's words—though some valuable perspectives are in them—but rather the context in which those words were published: a major American newspaper did not hesitate in publishing an editorial by the president of a major geopolitical rival nation, and the readers of the paper felt no hesitation to respond to a foreign political leader's Op-Ed piece, which received nearly 4,500 comments posted to the *New York Times*' website within the four days following its publication.⁵⁵ This exceptional ability to debate and critique the law and a government's actions is, along with reason, another hallmark of the rule of law. Two essential features for the study of the rule of law are the ability to debate law openly and freely, and to find both criticism and inspiration in the law of a nation studied.⁵⁶ This viewpoint is captured compellingly by many

15, 19, 21 (Thomas Carothers, ed. 2006)); David Pimentel, *Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review in Southern Sudan*, 2 HAGUE J. ON RULE L. 1 (2010); Louise Arbour, Op-Ed, *The Rule of Law*, INT'L HERALD TRIB., Sept. 27, 2012, available at <http://www.nytimes.com/2012/09/27/opinion/UN-general-assembly-on-the-rule-of-law.html>; Mark P. Lagon, Expert Brief, *Promoting Democracy: The Whys and Hows for the United States and the International Community*, U.S. COUNCIL ON FOREIGN REL. (Feb. 2011), <http://www.cfr.org/democratization/promoting-democracy-whys-hows-united-states-international-community/p24090>.

⁵⁵ Putin, *supra* note 38 available at <http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html?ref=opinion> (last visited Feb. 6, 2014).

⁵⁶ David M. Woodruff, *Law's Authorizations and Rule of Law Ideals: Lessons from Russia*, 41 GA. J. INT'L & COMP. L. 157, 160 (2012), offering an opportunity to define and critique the rule of law concept structurally on the hypothesis that “a workable, sustainable rule of law can only exist where law does not grant authority to some actors that allow them to affect the legal rights of other actors in unpredictable ways through the creation of legal facts.” From this hypothesis, Woodruff reasons that “it is crucial to recognize that laws that governing [sic] a capitalist order not only forbid some acts and require others, but also authorize a multitude of individuals and organizations, both inside and outside the state, to create legally significant facts at their own discretion;” and therefore, “rule-of-law ideals are attainable only insofar as authorizations are calibrated in ways that prevent their use to undermine the calculability and reliable implementation of law.” *Id.* at 181. Woodruff emphasizes the broader generality of his observations:

Although the examples provided here are drawn from Russia, nothing about the general argument on how miscalibrated authorizations undermine the rule of law

writings over the last century, but is well represented by the remarks of an Associate Justice of the U.S. Supreme Court to graduating law students in 1989:

What I'm going to say today, I address particularly to the law students because they are about to enter a profession which will require them to confront several very serious challenges [We] also live in a time when many citizens are suspicious of the law and the legal system. It is a suspicion that takes two forms.

First, the law and the legal system are challenged as being basically inequitable to so many who are unable to participate fully in the economic, political, and social life of the nation. With rising vehemence, the disaffected point to what they regard as indefensible inequities in our criminal law and procedure, in our tax and welfare systems, and in other systems as well. They demand change now; "all deliberate speed" will not suffice. The second suspicion is even more fundamental and has even more ominous portent, for it casts a cloud over the very rule of law. Law is regarded as an obstacle to, rather than an instrument of, the creation of a just and generous society.

Well, how are we of the legal profession—lawyer, judge, and law student—to meet these challenges? *It's easy and traditional to extol the virtues of the rule of law and to describe the horrors that would attend an anarchistic society, but we cannot content ourselves with an answer which relies on such abstractions.* A philosophical disquisition on the virtues of the rule of law cannot

depends on specific features of the Russian legal system. Indeed, the Russian experience sheds some light on a broader impasse in the discussion of whether building the rule of law is an effective route to development. This idea has received powerful backing and led to unprecedented levels of international funding for measures supporting the rule of law.

Id. at 181–82 (footnotes omitted).

justify inequities in our present legal system. *Our first task therefore is to demonstrate that we recognize these inequities and are confronting them with a promise of solution. Only when we succeed in this task will it be time to glorify the rule of law.*⁵⁷

The need for candid debate and criticism of laws and legal systems as foundations to achieve the rule of law has been recognized by attorneys in countries and cultures struggling to make the rule of law a sustainable reality in their countries.⁵⁸ For example, a Nigerian-educated lawyer (now law professor) specifically cited the exact words of Justice Brennan, quoted above, in the pages of the *Vanderbilt Journal of Transnational Law*:

The credibility and viability of the legal profession in society will be undermined if lawyers do not play active roles in law reform. The distrusting and cynical public will readily view nonchalant attitudes toward issues of law reform as complicity in perpetuating injustice in society. How can lawyers “expect much respect for the law from someone who has seen how readily even lawyer-citizens tolerated such inequities?” The only credible way for the legal profession to acquit itself of charges of complicity in perpetuating injustice is to champion law reform. Lawyers must constantly expose the inequities and defects in the legal system and offer suggestions for reform. Aggressive law reform championed by lawyers would convince the distrusting public that lawyers neither condone nor seek to perpetuate injustice in society. As Justice Brennan rightly observed:

Lawyers, before any other group, must continue to point out how the system is really working—how it actually affects

⁵⁷ William J. Brennan, Jr., Address, *Are Citizens Justified in Being Suspicious of the Law and the Legal System?*, 43 U. MIAMI L. REV. 981, 981–82 (1989) (emphasis added) (footnotes omitted).

⁵⁸ See, e.g., Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT'L L. 573, 624–25 (2000).

real people. They must constantly demonstrate to courts and legislatures alike the tragic results of legal nonintervention. They must highlight how legal doctrines no longer bear any relation to reality, whether in landlord and tenant law, holder in due course law, or any other law. In sum, lawyers must bring real morality into the legal consciousness.⁵⁹

Writing from the perspective of the struggle for establishing the rule of law in Nigeria, Professor Oko has passionately articulated one of the great learning opportunities for foreign-educated lawyers presented by a forum where legal issues and legal institutions can be fully and freely examined and critiqued:

Where citizens do not care about democracy and are reluctant to process their problems through the legal system, there is very little lawyers can do. Because the rules of etiquette prohibit lawyers from soliciting and advertising their services, lawyers are severely limited in the kinds of cases they handle and the clients they serve. The legal profession, for the most part, seems unprepared or has paid scant attention to the problems posed by citizens who distrust lawyers and shun the legal process. Lawyers will continue to be significantly limited in their efforts to deepen democracy unless they come up with coherent and pragmatic strategies to address the cultural ethos that spawn antidemocratic sentiments and mistrust for the legal process and legal actors, especially judges and lawyers.⁶⁰

It is precisely when the need to “come up with coherent and pragmatic strategies”⁶¹ to create the requisite culture for a sustainable

⁵⁹ *Id.* (footnotes omitted) (quoting Brennan, *supra* note 57, at 986).

⁶⁰ Okechukwu Oko, *Lawyers in Fragile Democracies and the Challenges of Democratic Consolidation: The Nigerian Experience*, 77 *FORDHAM L. REV.* 1295, 1317–18 (2009).

⁶¹ *Id.* at 1318.

rule of law that a forum for studying the American legal system—its successes, its failures, its challenges—in a free and open dialogue becomes critical.⁶² As argued below, the Internet provides an

⁶² See, e.g., Okechukwu Oko, *The Problems and Challenges of Lawyering in Developing Societies*, 35 RUTGERS L.J. 569, 571–72 (2004) (noting that while “[a] virile legal profession must therefore form part of the nation’s strategy to deepen and consolidate democracy,” there has been “virtually no effort . . . to examine the conditions necessary for the legal profession to function optimally.”). Professor Oko emphasizes that the need for seeding the legal culture of a country striving to achieve the rule of law with ideas and perspectives from other countries is not just for the practicing bar of that country, but also especially for the country’s judges:

Efforts to provide continuing legal education for judges are especially valuable in a developing society like Nigeria where military dictatorship, ethnic sentiments, and political favoritism have led to the appointment of judges with less than stellar credentials. Some problems with the judiciary are traceable to defects in the education and ethics of judicial appointees. Regular continuing judicial education programs, including seminars, workshops, and conferences conducted by eminent jurists, especially retired justices of the Supreme Court and the Court of Appeal, will offer useful and invaluable insight to judges on current developments and techniques on how to avoid ethical dilemmas involved in judging. Also, exchange programs and judicial training abroad should afford Nigerian judges the opportunity to share experiences and exchange information with their colleagues throughout the world. With proper education it may be possible to strengthen the self perception of the judiciary, eliminate unethical practices, and improve overall judicial performance.

Id. at 639–40 (footnotes omitted). See also Kirsten A. Dauphinais, *Training a Countervailing Elite: The Necessity of an Effective Lawyering Skills Pedagogy for a Sustainable Rule of Law Revival in East Africa*, 85 N.D. L. REV. 53 (2009); Samuel J. Levine & Russell G. Pearce, *Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and Rule of Law?*, 77 FORDHAM L. REV. 1635, 1641–42 (2009) (footnotes omitted) (critiquing the ABA’s “Rule of Law Initiative”—funded by the U.S. Departments of State and Justice along with U.S. Agency for International Development—because to the extent that the Initiative is seen to “rely solely on the dubious assertion that imposing high standards for legal education and bar admission is essential to achieving democracy, human rights, and rule of law,” it “rel[ies] on an unfounded ‘faith that scrupulous adherence to what is presented as the

optimized virtual location for that dialogue, and an online American Legal Studies program proves an optimal setting in which foreign-educated lawyers can begin to participate in that dialogue.

*C. THE CHALLENGES FACING BOTH GROUND-BASED RULE OF LAW
PROGRAMS IN OTHER COUNTRIES AND ONLINE AMERICAN LEGAL
STUDIES PROGRAMS: THE GREATER PROMISE OF ONLINE PROGRAMS
EVEN WITH THE CHALLENGES*

1. THE CHALLENGES FACING U.S. COLLEGES IN “LESS-OPEN”
SOCIETIES

An online forum for the study of the rule of law can be far more advantageous than a ground-based forum. Recently, the endeavors of American universities (such as New York University) and American legal educators (such as those who populate deanial and faculty positions at the Peking University School of Transnational Law in China) have come under scrutiny. Scrutiny stems from concerns that the ground-based schools in foreign nations (such as China and the United Arab Emirates) engage in a self-censorship, so as not to tread on the sensibilities of their ruling regimes—whose legal culture specifically, and societal norms generally, are not comfortable with the level of unsparing candor offered in most U.S. higher education institutions.⁶³ Examples of American institutions compromising academic freedom and freedom of expression on foreign campuses include Johns Hopkins University and NYU.⁶⁴ However, even NYU’s sanguine president expressed dubious views on this subject:

“I have no trouble distinguishing between rights of academic freedom and rights of political expression,” [NYU President, John Sexton,] told

American model will suffice to bring about major and desirable legal and perhaps political reform.”) (quoting William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism*, in *RAISING THE BAR: THE EMERGING LEGAL PROFESSION* 287, 287–88 (William P. Alford et al. eds., 2007)).

⁶³ See Jim Sleeper, Op-Ed., *Liberal Education in Authoritarian Places*, N.Y. TIMES, Sept. 1, 2013, at SR4. But see Pericles Lewis et al., Letters to the Editor, *U.S. Colleges in Less Open Societies*, N.Y. TIMES, Sept. 9, 2013, at A20 (describing positive views of other American academics connected with U.S. education institutions in China).

⁶⁴ See Sleeper, *supra* note 63.

Bloomberg News [in 2011]. “These are two different things.” This was a startling statement, coming from a scholar of constitutional law. And along with the controversy over a stand-alone campus that N.Y.U. opened in Abu Dhabi in 2010, it contributed to Mr. Sexton’s rising unpopularity back home: the arts and science faculty, N.Y.U.’s largest, voted “no confidence” in him in March [2013]. Both overseas campuses were financed primarily with foreign subsidies.⁶⁵

Indeed, Johns Hopkins directly experienced the heavy hand of a censorious governmental partner:

Johns Hopkins University, whose School of Advanced International Studies has a longstanding center in Nanjing, China, . . . has faced restrictions on political discussion: the halting of an on-campus public screening of a documentary about the Tiananmen Square uprising of 1989 and a ban on off-campus distribution of a journal started by an American student with articles by classmates.⁶⁶

As Professor Jim Sleeper has written in the pages of the *New York Times*, “pretending that freedom of inquiry can be separated from freedom of expression is naïve at best, cynical at worst.”⁶⁷ He also observes that “[t]here is perhaps no better example of such cynicism than at Yale . . . [which decided] to create a new undergraduate college in a joint venture with the National University of Singapore.”⁶⁸ Indeed, as Professor Sleeper notes, “[f]aculty members at the Claremont Colleges, in California, and University of Warwick, in Britain, cited concerns about academic freedom when they rebuffed Singapore’s offers to fund liberal arts colleges there — before Yale accepted.”⁶⁹

Writing in the English-language for the *South China Morning Post*, and from the comfortable distance that Hong Kong affords from Beijing or Singapore, Harry Lewis has pulled no punches in

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

calling the situation as it is.⁷⁰ Professor Lewis, who holds the Gordon McKay Professorship of Computer Science in Harvard's School of Engineering and Applied Sciences, and was formerly the Dean of Harvard College,⁷¹ put it bluntly when he said that "Asia is trying to shortcut a process that took centuries to create the great American universities."⁷² In addition, Professor Lewis throws down the gauntlet of candor at the feet of President Sexton and other American educators who are willing to define freedom to fit the demands of local governments, observing that "[a]t some point, American universities venturing into authoritarian states will have to square their ambitions with the values of their host countries."⁷³ Recalling "NYU president John Sexton's statement about his university's Shanghai campus . . . [that has] 'no trouble distinguishing between rights of academic freedom and rights of political expression,'"⁷⁴ Professor Lewis persuasively argues that:

Sexton is wrong. Anything can be political, not just the liberal arts but also the professional practice of business or law. For a university in which students can expect to study social issues of any kind, giving up the right to political expression means giving up the pursuit of the truth.⁷⁵

Nor, Professor Lewis counsels, should we be misleadingly impressed by "[t]he large flows of money through academia and the hunger for higher education in Asia, [for those phenomena] cannot obscure the reality that American higher education evolved in a climate of uncompromising commitment to freedom of thought and freedom of speech."⁷⁶ In tones that evoke Jefferson's proverbial "fire bell

⁷⁰ See Harry Lewis, *A Good Fit?*, S. CHINA MORNING POST, August 5, 2013, available at <http://www.scmp.com/comment/insight-opinion/article/1294242/can-great-american-universities-take-root-asia?login=1> (questioning the success rate of American universities' satellite campuses overseas).

⁷¹ *Curriculum Vitae: Harry R. Lewis*, HARV. SCH. ENGINEERING & APPLIED SCI., <http://lewis.seas.harvard.edu/content/curriculum-vitae> (last updated Jan. 30, 2014).

⁷² Lewis, *supra* note 70.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

[tolling] in the night,”⁷⁷ Professor Lewis admonishes his readers that “[c]ultures that do not honour those values among their citizens *will not be enduring hosts to American higher education - unless the American universities betray the very values that made them great.*”⁷⁸

These cautionary voices have been joined by the American Association of University Professors (AAUP), which issued a statement in 2009 addressing some of the same concerns articulated by both Professors Sleeper and Lewis:

. . . [A]s the U.S. and Canadian presence in higher education grows in countries marked by authoritarian rule, basic principles of academic freedom, collegial governance, and nondiscrimination are less likely to be observed. In a host environment where free speech is constrained, if not proscribed, faculty will censor themselves, and the cause of authentic liberal education, to the extent it can exist in such situations, will suffer.⁷⁹

In short, the AAUP concluded, “one needs to give serious consideration to whether academic freedom, and the personal freedoms that are a necessary prerequisite to its exercise, can in fact be sustained on a campus within what is a substantially authoritarian regime.”⁸⁰

Other commentators, noting that American universities quietly acquiesced to China’s decisions to ban a number of U.S. academics from teaching at the campuses in China,⁸¹ have observed that “American universities are no match for China’s Communist Party,” such that “[i]f they operate campuses in China or even maintain

⁷⁷ Letter from Thomas Jefferson to John Holmes, U.S. Senator, Me. (Apr. 22, 1820) (on file with the Library of Congress), *available at* <http://www.loc.gov/exhibits/jefferson/159.html>.

⁷⁸ Lewis, *supra* note 70 (emphasis added).

⁷⁹ *On Conditions of Employment at Overseas Campuses*, AM. ASS’N U. PROFESSORS, <http://www.aaup.org/report/conditions-employment-overseas-campuses> (last visited Jan. 19, 2014).

⁸⁰ Joan Bertin, Marjorie Heins, Cary Nelson, & Henry Reichman, *An Open letter from the AAUP to the Yale Community*, AM. ASS’N U. PROFESSORS, <http://www.aaup.org/news/2012/open-letter-aaup-yale-community> (last visited Jan. 19, 2014).

⁸¹ *Id.*

exchanges with their counterpart Chinese institutions, Beijing will exert pressure on them. Academic freedom, which does not exist in China, will suffer in America.”⁸² Some observers see clear proof of such concerns in the example of “Chen Guangcheng, the dissident legal advocate whose escape from house arrest to the American Embassy in Beijing last year provoked a diplomatic crisis,”⁸³ who, in June 2013, contended that “he was being forced to leave New York University over concerns that his activism was harming the university’s relationship with China.”⁸⁴

This censorious atmosphere also impacts the efforts of some American legal educators in their attempts to spread the rule of law by founding, and operating, law schools in foreign nations, particularly China. The most prominent of these efforts, the Peking University School of Transnational Law in Shenzhen, China, was founded in 2007 in a collaborative effort between Ivy-League American legal academics and Chinese educators.⁸⁵ While the Peking University School of Transnational Law has not been directly criticized for the kind of pandering to foreign governments that has dogged NYU, Johns Hopkins, and Yale, reports from first-hand observers of what passes for legal education at the school helps to explain why the program—contrary to what law schools should be

⁸² Gordon G. Chang, *No Match for a One-Party State*, N.Y. TIMES, Sept. 1, 2011, <http://www.nytimes.com/roomfordebate/2011/09/01/can-us-colleges-defend-academic-freedom/no-match-for-a-one-party-state>.

⁸³ Andrew Jacobs, *China Dissident Says He’s Being Forced from N.Y.U.*, N.Y. TIMES, June 17, 2013, at A3.

⁸⁴ *Id.* Of course, Hong Kong is an obvious and continuing exception, an oasis of academic freedom, despite the fact that “this former British colony was returned to Chinese rule in 1997,” because “the complex reality is that Hong Kong operates under its own laws, which allow students, academics and universities more freedom than they would have in the rest of the country, particularly at schools of media, communications and journalism.” Joyce Lau, *In Hong Kong, Freedom at Universities*, INT’L HERALD TRIB., Apr. 22, 2013, available at <http://www.nytimes.com/2013/04/22/world/asia/22iht-educhong22.html>. For responses taking issue with Mr. Chen’s assertions, see Andrew Jacobs, *After Epic Escape from China, Exile is Mired in Partisan U.S.*, N.Y. TIMES, July 11, 2013, at A1 (discussing both sides of the argument as to whether NYU has bowed to pressure from the Chinese government in determining Mr. Chen’s status at NYU).

⁸⁵ See Liz Gooch, *Chinese Universities Send Big Signals to Foreigners*, INT’L HERALD TRIB., Mar. 12, 2012, available at <http://www.nytimes.com/2012/03/12/world/asia/12iht-educlede12.html>.

challenging students to do—is unlikely to see its students stray into controversial territory:

The future is not entirely rosy, however. The location of the school on mainland China (rather than in Hong Kong or Taiwan, for example) ensures that the student body is almost entirely mainland, Han Chinese, and it is thus a student body that remains Chinese to its core. The students are used to a Chinese-style of education, in which a teacher lectures and students memorize. Students also have a distinctive interpretation of cheating and ethics that may not pass muster before many United States bar associations. These differences are exacerbated by the direct transplant of the United States J.D. system into the school, a transplant that ensures a United States education but also runs the risk of ignoring that many aspects of a good education rely upon cultural knowledge.

I frequently worried that the students were simply going through the motions of learning to provide the answers that the faculty expected, without actually absorbing the necessary information about the United States legal culture. For a student body that should be well-versed in United States law when it graduates, it is troubling to think that some may graduate without having truly examined the United States legal system and its differences with the Chinese legal system. These students appear staunchly resistant to anything different from the educational system to which they are accustomed. They are thus likely to graduate and proceed with their legal careers within the traditional Chinese framework without considering the international possibilities of their new education.⁸⁶

⁸⁶ Taryn Marks, *Special Report: Shifting Legal Education in China*, INT'L JUD. MONITOR, Spring 2012 (last visited Jan. 26, 2014), http://www.judicialmonitor.org/archive_spring2012/specialreport.html. Ms. Marks's observations came from her time serving as a lecturer at the Peking University School of Transnational Law. *See id.*

Interestingly, in 2012, when the American Bar Association's Legal Education Section declined to adopt a rule that would permit the Peking University School of Transnational Law to apply for ABA accreditation, one of the reasons for that decision cited concerns that the ABA Section would not be able to adequately monitor the School's compliance with academic freedom requirements.⁸⁷

2. THE PROMISE OF THE ONLINE LEARNING ENVIRONMENT IN OVERCOMING BOTH THE CHALLENGES FACING GROUND-BASED PROGRAMS AND THE SPECTER OF INTERNET MONITORING AND CENSORSHIP

Despite the concerns, an online American legal studies forum offers the opportunity for students from a broad range of cultures and countries to participate in a conversation about the rule of law by studying the legal system and laws of a particular country with lawyers and professors who are immersed and working within that system.⁸⁸ Additionally, an online learning environment would remove not only the physical limitations that attend all ground-based programs, including the high cost of on-campus LL.M. programs, but it would also remove the constant and intrusive physical scrutiny of brick and mortar campuses by local authorities bent on censorship. For example, being located outside of the countries from which its students will be drawn, an online American legal studies program and its web-based campus may operate with maximum academic freedom. That, of course, does not mean that the American legal studies program will be able to operate with complete freedom or even optimal freedom.⁸⁹

⁸⁷ Katherine Mangan, *U.S.-Style Law School in China Won't Be Considered for ABA Accreditation*, CHRON. HIGHER EDUC. (Aug. 6, 2012), <http://chronicle.com/article/ABA-Says-It-Wont-Accredit-Law/133387/>.

⁸⁸ See generally Lincoln Dahlberg, *The Internet and Democratic Discourse: Exploring the Prospects of Online Deliberative Forums Extending the Public Sphere*, 4 INFO. COMM. & SOC'Y 615 (2001), available at <http://epphenicie.iweb.bsu.edu/5820550.pdf> (discussing the role of the Internet as a host of public forums for a considered discourse).

⁸⁹ See, e.g., Jessica E. Bauml, Note, *It's a Mad, Mad Internet: Globalization and the Challenges Presented by Internet Censorship*, 63 FED. COMM. L.J. 697, 702-04 (2011) (discussing the various challenges associated with the Internet itself, and associated with who may control the Internet).

The centrality of the Internet and the social media that inhabit it lend themselves to the determination of international legitimacy sought by governments.⁹⁰ For example, through social media, the world took note of protests around the world, such as the Arab Spring and similar, popular movements against once-entrenched governments.⁹¹ However, the reality of the 21st-century Internet is that there are multiple, well-known (and to the mind of many in the global community, notorious) examples of government programs that systemically limit the availability and kind of access to the Internet for their citizens.⁹² For countries in which there is internet censorship by the government, lawyers who seek to participate in the robust conversation of an American legal studies program might find their internet access limited or even blocked.⁹³ Fortunately, however, these countries are still few—but of those few, some are eminently populous.⁹⁴ Yet, that does not mean, however, that ways cannot be—and are not—found to circumvent these restrictions; indeed circumventing censorship is both possible and, to varying degrees, practicable.⁹⁵ A recent article analyzing the effects of censorship on

⁹⁰ See generally, Kevin Gregg, Note, “Text ‘Revolution’ to Vote”: *Social Media’s Effect on Popular Consent and Legitimacy of New Regimes*, 31 B.U. INT’L L.J. 315 (2013).

⁹¹ See *id.* at 333–40.

⁹² See, e.g., Lewis S. Malakoff, Comment, *Are You My Mommy, or My Big Brother? Comparing Internet Censorship in Singapore and the United States*, 8 PAC. RIM. L. & POL’Y J. 423 (1999); Christopher Stevenson, Note, *Breaching the Great Firewall: China’s Internet Censorship and the Quest for Freedom of Expression in a Connected World*, 30 B.C. INT’L & COMP. L. REV. 531 (2007); J. Alex Halderman et al., *Internet Censorship in Iran: A First Look*, USENIX, <https://www.usenix.org/conference/foci13/internet-censorship-iran-first-look> (then follow hyperlink “Aryan PDF”) (last visited Jan. 20, 2014).

⁹³ See, e.g., Rebecca MacKinnon, *Flatter World and Thicker Walls? Blogs, Censorship and Civic Discourse in China*, 134 PUB. CHOICE 31, (2008) (discussing the effective Internet regulation used by the Chinese government).

⁹⁴ See SHANTHI KALATHIL & TAYLOR C. BOAS, OPEN NETWORKS CLOSED REGIMES: THE IMPACT OF THE INTERNET ON AUTHORITARIAN RULE (2003) (citing China, Cuba, Singapore, Burma, Vietnam, the United Arab Emirates, Saudi Arabia, and Egypt as examples of countries where Internet regulation is prolific).

⁹⁵ See e.g., Xueyang Xu, Z. Morley Mao & J. Alex Halderman, *Internet Censorship in China: Where Does the Filtering Occur?*, PASSIVE AND ACTIVE MEASUREMENT 2011, <http://pam2011.gatech.edu/program.html> (then

internet-user behavior thoroughly explored the results of a study conducted with participants who (covertly) participated from an undisclosed, internet-censoring country.⁹⁶ The researchers observed that “the ways that people in The Country experience blocking and censorship and the strategies they use to navigate the Internet underscore the urgent need to better understand how people in a broad variety of contexts experience and navigate blocking and censorship when making decisions about online contributions.”⁹⁷ American law schools hosting online American legal studies programs would do well to include, in their planning process, a careful consideration of the policy factors underlying the decisions of internet censors in particular countries so that they might anticipate the actions and reactions of those censors as part of a long-term strategic plan for making the program accessible to students in that country.⁹⁸ They would also do well to lobby the American corporations who have been complicit collaborators in a large measure of foreign-nation internet censorship.⁹⁹ In addition, as

follow “Internet Censorship in China: Where Does the Filtering Occur?” hyperlink) (last visited Jan. 20, 2014); *see also* MacKinnon, *supra* note 93, at 32–38 (discussing proxy servers and blogs as a method that may be used to circumvent Internet regulation, to an extent, in China).

⁹⁶ *See* Irina Shklovski & Nalini P. Kotamraju, *Online Contribution Practices in Countries that Engage in Internet Blocking and Censorship*, in PROCEEDINGS OF ACM CHI 2011 CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 1109 (2011), *available at* <http://www.itu.dk/~irsh/pubs/p1109-shklovski.pdf>.

⁹⁷ *Id.* at 1118.

⁹⁸ Dynamic research in such areas is being done not only by academics and professionals, but by doctoral dissertation students as well. *See, e.g.*, David Bamman, Brendan O'Connor & Noah A. Smith, *Censorship and Deletion Practices in Chinese Social Media*, 17 FIRST MONDAY (March 5, 2012), <http://journals.uic.edu/ojs/index.php/fm/article/view/3943/3169>.

⁹⁹ *See* Surya Deva, *Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?*, 39 GEO. WASH. INT'L L. REV. 255 (2007); William J. Cannici, Jr., Note, *The Global Online Freedom Act: A Critique of Its Objectives, Methods, and Ultimate Effectiveness Combating American Businesses that Facilitate Internet Censorship in the People's Republic of China*, 32 SETON HALL LEGIS. J. 123 (2007). First introduced in 2004, the U.S. Congress has considered, but not yet adopted, a bill entitled “The Global Online Freedom Act,” which “would require technology firms operating in a designated group of restrictive countries to publish annual reports showing how they deal with human-rights issues.” *Free to Choose: Governments and Internet Firms are*

another commentator suggests, there may be opportunities for legal educators to foment a complaint about a leading practitioner of internet censorship with the World Trade Organization in which the censoring nation has a major, vested stake in its membership.¹⁰⁰ We have concluded that the rule of law concept is, at its essence, expressed as the bounding of power by reason in an atmosphere in which frank, public dialogue critiquing the legal system and its participants can occur without fear or threat of reprisal. Optimizing freedom of internet-based discourse is both a prerequisite to, as well as a byproduct of, an online American Legal Studies LL.M. program.

*D. A CASE STUDY THAT TRANSCENDS THE STEREOTYPICAL RULE OF LAW
SCENARIOS*

On the international stage, stories of the struggle for judicial supremacy play out almost daily. As Justice Robert H. Jackson once described them, these stories in which the judicial branch in other nations seems locked in a mortal, political, and sometimes even physical combat with other forces in the country or the country's

Wrestling with the Rules for Free Speech Online, *ECONOMIST*, Oct. 6, 2012, 70. More specifically, "[i]nternet companies listed on U.S. stock exchanges and operating in designated countries would be required to publish in their annual reports policies addressing human rights due diligence, disclosure of personally identifiable information to such governments, and transparency of restrictions on search engines and content hosting services." Ian Brown, *The Global Online Freedom Act*, 14 *GEO. J. INT'L AFF.* 153, 154 (2013).

¹⁰⁰ See, e.g., Jennifer Shyu, *Speak No Evil: Circumventing Chinese Censorship*, 45 *SAN DIEGO L. REV.* 211, 246–47 (2008); Cynthia Liu, Note, *Internet Censorship as a Trade Barrier: A Look at the WTO Consistency of the Great Firewall in the Wake of the China–Google Dispute*, 42 *GEO. J. INT'L L.* 1199, 1227–37 (2011); Fredrik Erixon, Brian Hindley & Hosuk Lee-Makiyama, *Protectionism Online: Internet Censorship and International Trade Law* 1 (European Ctr. for Int'l Political Econ., Working Paper No. 12/2009), available at http://www.ecipe.org/media/publication_pdfs/protectionism-online-internet-censorship-and-international-trade-law.pdf (suggesting that while many WTO members have “the option to selectively censor [cross-border Internet services,] . . . there is a good chance that a [WTO Dispute Settlement Body] panel might rule that permanent blocks on search engines, photo-sharing applications and other services are inconsistent with the GATS provisions, even given morals and security exceptions.”).

government.¹⁰¹ Several reports of serious confrontations between the judiciary and the executive (and sometimes, the legislative) branch, for example, have been in the news in Egypt¹⁰² and Pakistan,¹⁰³ and analysis of whether Turkish courts will follow suit has been undertaken.¹⁰⁴ Other leaders, such as Fiji's Commodore Josaia Voreqe Bainimarama, have literally set fire to new national constitutions before their authors:

Mr. Bainimarama seized power in Fiji, a former British colony made up of about 330 islands in the central Pacific Ocean, in a 2006 coup—the country's fourth since independence in 1970. He has insisted that military rule was the only way to ensure an end to the spasms of political and ethnic violence that have so often destabilized the country. Since then, however, accusations of human rights abuses have dogged his government, souring relations with its traditional allies, Australia and New Zealand.

In early 2012, Mr. Bainimarama lifted a state of emergency that had been in place since he abrogated the Constitution in 2009, and he announced that free elections would be held by

¹⁰¹ See ROBERT HOUGHWOUT JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* (1941).

¹⁰² Ben Hubbard, *Egypt Court Chips Away at Influence of President*, N.Y. TIMES, June 3, 2013, at A4; David D. Kirkpatrick, *Blow to Transition as Court Dissolves Egypt's Parliament*, N.Y. TIMES, June 15, 2012, at A1; David D. Kirkpatrick, *Egypt Court Cancels Parliamentary Elections*, N.Y. TIMES, March 7, 2013, at A8; see also Lama Abu Odeh, *The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere*, 59 AM. J. COMP. L. 985, 1003–04 (2011).

¹⁰³ See Kahn Faqir, Fakhrul Islam & Shahid Hassan Rizvi, *The Lawyers Movement for Judicial Independence in Pakistan: A Study of the Musharraf Regime*, 2 ASIAN J. SOC. SCI. & HUMAN. 345 (2013), available at [http://www.ajssh.leena-luna.co.jp/AJSSHPDFs/Vol.2\(2\)/AJSSH2013\(2.2-38\).pdf](http://www.ajssh.leena-luna.co.jp/AJSSHPDFs/Vol.2(2)/AJSSH2013(2.2-38).pdf); Mohammad Waseem, *Judging Democracy in Pakistan: Conflict Between the Executive and Judiciary*, 20 CONTEMP. S. ASIA 19 (2012); Huma Yusuf, *Restraint for Now: Pakistan's Supreme Court Seeks Compromise with Government*, 175 ASIA-PAC. BULL. (2012), available at http://www.eastwestcenter.org/sites/default/files/private/apb175_0.pdf.

¹⁰⁴ See Asli U. Bali, *The Perils of Judicial Independence: Constitutional Transition and the Turkish Example*, 52 VA. J. INT'L L. 235 (2012).

2014. But in January he scrapped a draft constitution that had been seen as crucial to any return to democracy. The police even seized hundreds of copies of the document and burned them in front of their architect, an internationally renowned legal scholar.¹⁰⁵

Upon reflection of the modern day judicial supremacy struggle in foreign countries, Justice Robert H. Jackson might observe that “never has Power been more contumacious in the face of Reason.”¹⁰⁶

A simplistic view of the takeaway that an American legal studies program might offer is a seemingly stark contrast between those foreign courts and U.S. courts. Such an ego-centric approach would be both ineffectual as well as imbued with the kind of imperialistic narcissism that provokes rejection, rather than embrace, in foreign lawyers with less American-centric viewpoints.¹⁰⁷ Indeed, it would not take those foreign lawyers long to be able to point to very recent judicial debacles of our own. For example, the shameful state supreme court conflict of interest case that arose when a coal company executive sought to curry favor with the chief justice of that court by flying the chief justice to Monaco and donating \$3 million in campaign contributions prior to the chief justice sitting in on a major appeal by that company in a civil case it had lost.¹⁰⁸ This incident led to the extraordinary step of having to take the conflict of interest matter to the U.S. Supreme Court.¹⁰⁹ Another example of an

¹⁰⁵ Matt Siegel, *Video of Police Beating in Fiji Prompts Ire*, N.Y. TIMES, Mar. 10, 2013, at A8; see also Matt Siegel, *In Fiji, a Detour on the Road to Democracy*, INT’L HERALD TRIB., July 2, 2012, available at <http://www.nytimes.com/2012/07/03/world/asia/in-fiji-a-detour-on-the-road-to-democracy.html>.

¹⁰⁶ See generally JACKSON, *supra* note 101.

¹⁰⁷ Indeed, election of state judges and life tenure for federal judges would be non-starters for lawyers in most other legal systems. See Mary L. Volcansek, *Judicial Elections and American Exceptionalism: A Comparative Perspective*, 60 DEPAUL L. REV. 805 (2011).

¹⁰⁸ *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872–74 (2009).

¹⁰⁹ See *id.* at 886 (holding that the Due Process clause of the 14th Amendment applied where, without Chief Justice Benjamin’s recusal, “Justice Benjamin would review a judgment that cost his biggest donor’s company \$50 million [For] no man is allowed to be a judge in his own cause, similar fears of bias can arise when . . . a man chooses the judge in his own cause.”); see also Adam Liptak, *Justices Tell Judges Not to Rule on*

American judicial debacle is the case of the two juvenile court judges in Pennsylvania who were tried and convicted of accepting kickbacks to impose jail sentences on juvenile defendants so they would be housed in prisons run by a for-profit corporation.¹¹⁰ A third American judicial debacle involved tensions within another state supreme court that lead to fisticuffs between two justices in chambers.¹¹¹

Thus, the narrative of American rule of law must go beyond the triumphalism of familiar scenarios where only one side or one facet of the rule of law is illustrated or a favored viewpoint is promoted. Rather, a starting point for the study of America's rule of law should be a scenario that is divisive, politicized, and imbued with dilemma. It is in those scenarios—which some legal thinkers call “hard cases”¹¹²—that a legal system's ability to manage conflict is most sorely tested, and the features of the legal system's rule of law

Major Backers, N.Y. TIMES, June 9, 2009, at A1; Adam Liptak, *U.S. Supreme Court is Asked to Fix Troubled West Virginia Justice System*, N.Y. TIMES, Oct. 12, 2008, at A41.

¹¹⁰ See Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, N.Y. TIMES, Feb. 13, 2009, at A22; see also Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589 (2012).

¹¹¹ Crocker Stephenson et al., *Justices' Feud Gets Physical: Prosser, Bradley Clashed on Eve of Union Ruling*, MILWAUKEE J. SENTINEL, June 25, 2011, at A1, available at <http://www.jsonline.com/news/statepolitics/124546064.html> (discussing conflicting reports from fellow justices as to whether Justice David Prosser put Justice Ann Walsh Bradley “in a chokehold” or whether Justice Bradley “charged him with fists raised” leaving Justice Prosser no option but to “put his hands in a defensive posture.”).

¹¹² Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975) (defining “hard cases” as a cases in which “no settled rule dictates a decision either way . . . [and where] it might seem that a proper decision could be generated by . . . principle.”); see Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22–29, 45 (1967) (drawing an important distinction between principles and rules, the former of which may be used to determine the outcome of hard cases); Daniel D.N. Nsereko, Book Review, 28 CANADIAN J. AFR. STUD., 150 (1994) (reviewing DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* (1991)); see also Roger J. Traynor, Assoc. Justice, Cal. Supreme Court, *La Rude Vita, La Dolce Giustizia*; or *Hard Cases can Make Good Law*, Address delivered at the University of Chicago Law School (Oct. 3, 1961), in 29 U. CHI. L. REV. 223 (1962).

concept are most sorely put to the test of a refiner's fire. In short, hard cases make for the most fruitful examination of what the rule of law really means within a particular country, legal system, and legal culture.

Such hard cases arise where the dynamics of different constituencies and political, as well as strictly legal, processes are shown in their fullest scope of operation. Such a scenario should demonstrate the rule of law does not always result in a "win" for a particular "side," or a particular substantive viewpoint. Rather, the richest opportunity for study will be a scenario where the "right" and "wrong" merits of a case are blurred, contradictory, and difficult for those studying the scenario to reach a consensus on evaluating those merits. Instead, the scenario will emphasize the ability of a rule of law system to accommodate the dynamics of power, personality, and public law.

Of the many hard cases that one might select to illustrate the kind of scenario that beckons discussion in an online American legal studies program, a case that must make a remarkable impact on any legally trained mind is that which arose around the curious career of Roy Moore, a current—and former—Chief Justice of the Alabama Supreme Court, whose agenda, saga, and reversals of fortune arguably illustrate the American rule of law concept. Chief Justice Moore "installed a two-and-one-half ton monument to the Ten Commandments as the centerpiece of the rotunda in the Alabama State Judicial Building"¹¹³ assertedly for the following reasons:

[T]o remind all Alabama citizens of, among other things, his belief in the sovereignty of the Judeo-Christian God over both the state and the church. And he rejected a request to permit a monument displaying a historically significant speech in the same space on the grounds that "[t]he placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument."¹¹⁴

¹¹³ *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003).

¹¹⁴ *Id.* (quoting *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1297 (M.D. Ala. 2002)). The Court also elaborated on Chief Judge Moore's out-of-hand

After attorneys who regularly used the courthouse filed suit challenging Judge Moore's actions as violations of the Establishment Clause of the U.S. Constitution's First Amendment, the federal court in Montgomery, Alabama, ordered Judge Moore to remove the monument,¹¹⁵ and, when he refused to comply with that court's order, enjoined him to do so.¹¹⁶ As Judge Myron Thompson wrote in his District Court opinion:

If all Chief Justice Moore had done were to emphasize the Ten Commandments' historical and educational importance (for the evidence shows that they have been one of the sources of our secular laws) or their importance as a model code for good citizenship (for we all want our children to honor their parents, not to kill, not to steal, and so forth), this court would have a much different

rejection to a citizen's prior request to place a different display in the rotunda:

An Alabama State Representative asked the Chief Justice if a monument containing the Rev. Dr. Martin Luther King Jr.'s famous "I Have a Dream" speech could be placed in the rotunda. The Chief Justice denied the request in a letter, stating that, "The placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument."

Id. at 1287 (quoting *Glassroth*, 229 F. Supp. 2d at 1297).

¹¹⁵ See *Glassroth*, 229 F. Supp. 2d at 1299, 1304. The federal district judge, Myron Thompson, issued his judgment in the case in a form that would have allowed Judge Moore to bring himself back within the ambit of law:

The plaintiffs ask that the court enter an injunction requiring Chief Justice Moore to remove his Ten Commandments monument forthwith. The court declines to enter such an injunction at this time. Instead, the court will enter a declaration that Justice Moore's placement of his Ten Commandments monument in the Alabama State Judicial Building was unconstitutional, and will allow Justice Moore thirty days to remove it. If the monument is not removed within thirty days, the court will then enter an injunction requiring Justice Moore to remove it within fifteen days thereafter.

Id. at 1319.

¹¹⁶ *Glassroth v. Moore*, 242 F. Supp. 2d 1067 (M.D. Ala. 2002).

case before it. But the Chief Justice did not limit himself to this; he went far, far beyond. He installed a two-and-a-half ton monument in the most prominent place in a government building, managed with dollars from all state taxpayers, with the specific purpose and effect of establishing a permanent recognition of the "sovereignty of God," the Judeo-Christian God, over all citizens in this country, regardless of each taxpaying citizen's individual personal beliefs or lack thereof. To this, the Establishment Clause says no.¹¹⁷

In rejecting Chief Justice Moore's appeal from the district court orders, Judge Edward Carnes, a fellow Alabamian, and a former Assistant Attorney General for the State of Alabama, pulled no punches about the company into which Moore's defiant actions had placed him:

Finally, we turn to a position of Chief Justice Moore's that aims beyond First Amendment law to target a core principle of the rule of law in this country. . . .

. . . .
The clear implication of Chief Justice Moore's argument is that no government official who heads one of the three branches of any state or of the federal government, and takes an oath of office to defend the Constitution, as all of them do, is subject to the order of any court, at least not of any federal court below the Supreme Court. In the regime he champions, each high government official can decide whether the Constitution requires or permits a federal court order and can act accordingly. That, of course, is the same position taken by those southern governors who attempted to defy federal court orders during an earlier era. *See generally, e.g., Meredith v. Fair*, 328 F.2d 586, 589-90 (5th Cir. 1962) (en banc) (enjoining Mississippi Governor Ross Barnett from interfering with the district court's order to admit a black student to the University of Mississippi); *Williams*

¹¹⁷ *Glassroth*, 229 F. Supp. 2d at 1318.

v. Wallace, 240 F. Supp. 100, 110 (M.D. Ala. 1965) (Johnson, J.) (enjoining Alabama Governor George C. Wallace from interfering with and failing to provide police protection for plaintiffs' march from Selma to Montgomery); *cf. United States v. Barnett*, 376 U.S. 681 (1964) (holding that the Governor of Mississippi was not entitled to a jury trial on a charge of criminal contempt for willfully disobeying a temporary restraining order of a federal district court).

Any notion of high government officials being above the law did not save those governors from having to obey federal court orders, and it will not save this chief justice from having to comply with the court order in this case. *See* U.S. Const. Art. III, § 1; *id.* Art. VI, cl. 2. What a different federal district court judge wrote forty years ago, in connection with the threat of another high state official to defy a federal court order, remains true today:

In the final analysis, the concept of law and order, the very essence of a republican form of government, embraces the notion that when the judicial process of a state or federal court, acting within the sphere of its competence, has been exhausted and has resulted in a final judgment, all persons affected thereby are obliged to obey it.

United States v. Wallace, 218 F. Supp. 290, 292 (N.D. Ala. 1963) (enjoining Governor George C. Wallace from interfering with the court-ordered desegregation of the University of Alabama)

The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. The chief justice of a state supreme court, of all people, should be expected to abide by that principle. We do expect that if he is unable to have the district court's order overturned through the usual appellate processes, when the time comes Chief Justice Moore will obey that order. If necessary, the court

*order will be enforced. The rule of law will prevail.*¹¹⁸

The story does not end there, however, and the case continues to illustrate the operation of the rule of law in America: Alabama's Judicial Inquiry Commission removed Chief Justice Moore from office.¹¹⁹ Nine years later, however, Roy Moore qualified again to run for the Chief Justice's spot, and won the election.¹²⁰ As the *New York Times* observed:

Alabama, like 30 other states, elects Supreme Court justices, and Mr. Moore, who was not impeached, is still eligible to hold office. He received 50.3 percent of the primary vote, swept up by a tide of religious conservatives backing Rick Santorum in the Republican presidential contest.

"I don't think many people went to the polls thinking about voting for chief justice," said William H. Stewart, a political scientist at the University of Alabama. "But everybody knows the Ten Commandments judge, and when they had the opportunity to put the 'C.J.' back before his name, they took it."

¹¹⁸ *Glassroth*, 335 F.3d at 1302–03 (emphasis added).

¹¹⁹ See generally Justin A. Barkley, Note, *Judges Behaving Badly: The Disciplining of Judges by the Alabama Court of the Judiciary*, from *Richard Emmet to Roy Moore*, 29 J. LEGAL PROF. 191 (2004–2005); Andrew E. Brashier, Comment, *Ex Parte Alabama State Bar: Who Has Jurisdiction When Judges Act Unethically as Lawyers*, 33 AM. J. TRIAL ADVOC. 187 (2009).

¹²⁰ See William H. Stewart, Book Review, 52 AM. STUD. J. 157 (2013) (reviewing ALLEN TULLOS, *ALABAMA GETAWAY: THE POLITICAL IMAGINARY AND THE HEART OF DIXIE* (2011)) ("When Roy Moore was re-nominated as Alabama chief justice in March 2012, . . . the voters were clearly adopting a 'sez you!' stance toward federal Judge Myron Thompson as well Moore's own colleagues who had removed his offending Ten Commandments monument from the state judicial building."); Robbie Brown, *Years After Ten Commandments Fight, Ex-Justice Plans Return*, N.Y. TIMES, Mar. 25, 2012, at A19 (noting that Moore was "on the verge of a political comeback" and that "[i]n an upset two weeks ago, he won the Republican nomination without a runoff, against two far better financed opponents, including the current chief justice"); Campbell Robertson, *Hard-Nosed Approach Wins Votes in the South, but Lacks Broader Appeal*, N.Y. TIMES, Nov. 12, 2012, at A16 (noting Moore's re-election).

Mr. Moore has few admirers among Alabama's legal establishment. In a recent survey of 351 lawyers by the Mobile Bar Association, he received only three votes for the candidate "best qualified to serve" as chief justice.

Although Mr. Moore said he tires of talking about the Ten Commandments case, he acknowledged its role in helping him win the nomination.

"The people were upset their votes were taken away," he said. "The people didn't unelect me, but it'll be the people who vote me back."¹²¹

The picture of the rule of law is much more complex than many Americans—lawyers and non-lawyers alike—are prone to acknowledge. Indeed, the dissonance between the substantive merits of partisan positions, as compared to the orderly processes by which those dissonances are resolved in the unique American mixture of judicial decisions, politics, and elections, cannot be better illustrated than in this topsy-turvy, uniquely American tale.

The lessons that foreign lawyers may take away from the career of Chief Justice Moore are likely to vary considerably by the sympathies and empathies they bring to the table.¹²² Some may even

¹²¹ Brown, *supra* note 120.

¹²² For example, Russian lawyers who support the recent measures of the Russian Parliament in enacting legislation targeted at suppressing so-called "gay propaganda" might very well celebrate the return to power from the state of disgrace of a judge who expressed strikingly similar viewpoints on homosexuality, and the asserted power of government to limit the rights of individuals who do not seek to dissemble their sexual orientation, in the notorious case of *Ex parte H.H.*, 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., specially concurring). Lawyers from other legal cultures that have been more tolerant or supportive of human differences might be struck at how such a ruling could be made in the 21st century. When their attention is directed to the Montana Supreme Court's citation of Judge Moore's concurrence as symptomatic of an underlying discriminatory animus in American culture that the Montana court found incompatible with its view of the Equal Protection obligation under the Montana constitution, these foreign lawyers will be prompted to think closely about a legal system where the law can be one thing in Alabama and another in Montana. See *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 455 (2004).

find the dichotomy between the Free Exercise and Establishment Clauses of the First Amendment to be culturally incomprehensible.¹²³ Others may find the notion of popularly elected judges inexplicable. In short, not all foreign lawyers studying this scenario will depart from the same intellectual place, nor end up at the same intellectual destination. To borrow a phrase from Justice Robert H. Jackson, some may even feel as if they are “likely to leave by the same door through which [they enter].”¹²⁴

That is not necessarily an undesirable thing. Taking the time to examine such a narrative of the American legal system at work provides valuable common ground around which to build a dialogue about the way in which governmental powers, judicial independence, and popular elections interact in the American rule of law environment. From that discussion, foreign lawyers may be prompted to consider not only how such scenarios *would* play out in

¹²³ See, e.g., Anne S.Y. Cheung, *In Search of a Theory of Cult and Freedom of Religion in China: The Case of Falun Gong*, 13 PAC. RIM L. & POL'Y J. 1 (2004); Nina Crimm, Prof., St. John's Univ. Sch. of Law, Javier Martínez-Torrón, Prof., Universidad Complutense de Madrid & Elisabeth Zoller, Prof., Université Panthéon Assas, *Laïcité in Comparative Perspective* Panel Discussion, in 49 J. CATHOLIC LEGAL STUD. 101 (2010); Rosalind I.J. Hackett, *Regulating Religious Freedom in Africa*, 25 EMORY INT'L L. REV. 853 (2011); Thio Li-ann, *Contentious Liberty: Regulating Religious Propagation in a Multi-Religious Secular Democracy*, 2010 SING. J. LEGAL STUD. 484; Shylashri Shankar, *The Substance of the Constitution: Engaging with Foreign Judgments in India, Sri Lanka, and South Africa*, 2 DREXEL L. REV. 373 (2010); Jonathan K. Stubbs, *Persuading Thy Neighbor to Be as Thyself: Constitutional Limits On Evangelism in the United States and India*, 12 UCLA PAC. BASIN L.J. 360 (1994); Marci A. Hamilton, *Slouching Toward Globalization: Charting the Pitfalls in the Drive to Internationalize Religious Human Rights*, 46 EMORY L.J. 307 (1997) (reviewing RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE (John Witte, Jr. & Johan D. van der Vyver, eds., 1996)). See generally John H. Mansfield, *The Religion Clauses of the First Amendment and Foreign Relations*, 36 DEPAUL L. REV. 1 (1987). Cf. Leo Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 564 (1979–1980) (“The draftsmen of the [Establishment Clause] regarded freedom of religion and establishment as incompatible.”); Jessica Powley Hayden, Note, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171, 182–85 (2006) (discussing the small role the Establishment Clause plays in the U.S.’s extraterritorial powers).

¹²⁴ *Dalehite v. United States*, 346 U.S. 15, 49 (1953) (Jackson, J., dissenting).

their home country's legal system, but also how such scenarios *should* play out, and whether law and government reform is needed to effect that result. Indeed, the overarching lesson of this episode is the essence of the rule of law in America: The ability of the legal system to stand in criticism of itself, of the public to stand in criticism of the legal system, and of the popular vote as a force with which to be separately reckoned in balancing judicial power with legislative power.

III. THE EMERGENCE OF LEGAL EDUCATION ONLINE: THE PROMISE, THE STEREOTYPES, THE CURRENT BARRIERS

A. *THE PROMISE OF ONLINE LEGAL EDUCATION: OVERCOMING STEREOTYPES*

The author of this article was transitioning from law practice as a partner in a major Atlanta-based law firm to faculty member at his present law school in 1999 when he learned for the first time of an online law school while reading the then-new Jurist website.¹²⁵ Supreme Court Justice Ruth Bader Ginsburg was quick to criticize the concept¹²⁶—with no knowledge or experience of online education from which to draw—and she succeeded in establishing a pattern both of stereotyping and shooting from the hip that was to define too much of the conversation about the role the internet should have, and would have, in legal education.

Justice Ginsburg fired the first shot of the debate in 1999 when she delivered an address at the then-new Rutgers University Center for Law and Justice in which she decided to hold forth on the relationship of the Internet to legal education.¹²⁷ Justice Ginsburg saw this relationship exceptionally narrowly as “a supplement to classroom teaching,” and—having never taken (so far as anyone could tell) a moment of online legal education—decreed that “[t]he

¹²⁵ See generally *Justice Ginsburg on Internet Law Schools*, JURIST (Sept. 15, 1999), <http://jurist.law.pitt.edu/colloq1.htm>.

¹²⁶ See Pam Mendels, *Skepticism About Online Law Degrees From a Supreme Court Justice*, CYBER L.J. (Oct. 1, 1999), <http://partners.nytimes.com/library/tech/99/10/cyber/cyberlaw/01law.html>; see also Katherine S. Mangan, *Justice Ginsburg Questions Internet-Only Law School*, CHRON. HIGHER EDUC., Sept. 24 1999, at A36, available at <http://chronicle.com/article/Justice-Ginsburg-Questions/31346>.

¹²⁷ See Mendels, *supra* note 126.

process inevitably loses something vital when students learn in isolation, even if they can engage in virtual interaction with peers and teachers.”¹²⁸ She concluded these *ex tempore* remarks by observing that she was “troubled” at the idea that “a student can get a J.D. . . . without ever laying eyes on a fellow student or professor.”¹²⁹ Had she accepted the invitation of a plucky online law school dean at the time, who invited Justice Ginsburg to *experience* the online curriculum of the school, which he emphasized “won’t replace fixed facility schools and doesn’t seek to do so, but . . . can make quality legal education accessible to those who otherwise wouldn’t be able to take advantage of it,”¹³⁰ Justice Ginsburg might have refined, and perhaps even modified, her opinion. Had she held her commentary until she had time to do some research on the topic of online legal education, she might have benefitted from the enlightenment of a landmark article by Professor Oliphant of William Mitchell College of Law, who closely examined and explained the detailed and thoughtful learning model and highly effective technology platform used by the country’s only entirely online law school.¹³¹

The “proof of the pudding,” as an Old World proverb goes, “is in the eating.”¹³² Since 2001, the author of this article has designed and taught multiple online J.D. program courses in Commercial Law, International Business Transactions and Writing, Jurisprudence and Writing, and Conflict of Laws to many groups of students.¹³³ He has also taught online courses in Torts, Contracts, Criminal Law, Contract Drafting, and Corporations and Business Associations.¹³⁴ It is not boastful for the author to observe that he is almost certainly more experienced in teaching law school courses online than any

¹²⁸ Josh Ard, *Serving over the Net: Legal Education over the Internet*, 79 MICH. B.J. 1050, 1050 (2000).

¹²⁹ *Id.*

¹³⁰ Jack Goetz, Comment to *Justice Ginsburg on Internet Law Schools*, JURIST, <http://jurist.law.pitt.edu/colloq1.htm> (last visited Feb. 6, 2014).

¹³¹ See generally Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841 (2000).

¹³² See William Safire, *Proof Pudding*, N.Y. TIMES SUNDAY MAG., Oct. 19, 2008, at MM16; see also MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE 325 (Edith Grossman, trans., HarperCollins Publishers Inc. 2003).

¹³³ See Jeffrey A. Van Detta, ATLANTA’S J. MARSHALL L. SCH., <http://www.johnmarshall.edu/facultystaff/jeffrey-a-vann-detta/> (last visited Jan. 26, 2014) (providing the author’s CV).

¹³⁴ See *id.*

other member of a brick-and-mortar law school faculty. That experience has taught the author that online legal education can be consistently as effective, and often even *more* effective, than the traditional classroom, despite the alchemy claimed for the latter by those who have had little or no experience with online course design or delivery.

B. THE PROMISE OF ONLINE LEGAL EDUCATION

Over the fourteen years since Justice Ginsburg's comments, the presence of online instruction in legal education has increased dramatically and enjoyed success.¹³⁵ Rather than isolating, online legal education has proven to be bond-building. Rather than passive, online legal education has proven to be highly interactive. Rather than becoming a separating force, online legal education has been an incredibly cohesive force by creating (particularly in moderated, online live classrooms) a safe space where students are so engaged

¹³⁵ See, e.g., THE WORKING GRP. FOR DISTANCE LEARNING IN LEGAL EDUC., HARVARD L. SCH. PROGRAM ON THE LEGAL PROFESSION, DISTANCE LEARNING IN LEGAL EDUCATION: A SUMMARY OF DELIVERY MODELS, REGULATORY ISSUES, AND RECOMMENDED PRACTICES 17–18, 20, 22, 46 (Rebecca Purdom ed., n.d.), *available at* http://www.law.harvard.edu/programs/plp/pdf/Distance_Learning_in_Legal_Ed.pdf; Peter W. Martin, *Employing Technology to Erode Legal Education's Twin Barriers of Distance and Cost*, 61 RUTGERS L. REV. 1115, 1120, 1121–23 (2009); Michael L. Perlin, *Online, Distance Legal Education as an Agent of Social Change*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 95, 99 (2011); Richard A. Westin, *The Need for Prompt Action to Revise American Law Schools*, 46 AKRON L. REV. 137, 158–63 (2013); Abigail Cahak, Note, *Beyond Brick-and-Mortar: How (Cautiously) Embracing Internet Law Schools Can Help Bridge the Legal Access Gap*, 2012 U. ILL. J.L. TECH. & POL'Y 495, 501, 504–05, 525, 526 (2012); see also Nick Dranais, *Past the Pall of Orthodoxy: Why the First Amendment Virtually Guarantees Online Law School Graduates Will Breach the ABA Accreditation Barrier*, 111 PENN ST. L. REV. 863, 866–68 (2007); Stephen M. Johnson, *Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of MacCrate, Carnegie, and Best Practices*, 92 NEB. L. REV. 46, 83–84 (2013); Todd E. Pettys, *The Analytic Classroom*, 60 BUFF. L. REV. 1255, 1293–99 (2012); Naseem Stecker, *Logging on to a Law Education*, 82 MICH. B.J. 40, 41–43 (2003).

that class participation rates soar to 80%–90%¹³⁶ on a regular basis, as the moderated format brings forth the “silent majority” of law students who rarely speak in class.¹³⁷ In addition, online legal education helps students (and helps professors to help students) focus on the logic and syntax of written legal expression—the skill that is at the heart of modern-law practice and the one that many graduate students, in law or other disciplines, find to be the most challenging. (Indeed, that is precisely the reason the author recently transformed two of his online J.D. program seminar courses—“International Business Transactions” and “Jurisprudence”—into courses now called “International Business Transactions and Writing” and “Jurisprudence and Writing” to further emphasize the online forum’s suitability for focus on the written word.)¹³⁸

¹³⁶ This figure comes from the author’s direct teaching experience, as he has taught students in the same term in the same course using both physical and virtual classrooms.

¹³⁷ See Paula E. Berg, *Using Distance Learning to Enhance Cross-Listed Interdisciplinary Law School Courses*, 29 RUTGERS COMPUTER & TECH. L.J. 33, 40 n.26, 43 n.31 (2003) (citing five separate, scholarly articles authored by law professors who have taught online courses for the proposition that “online discussion forums increase student participation in class discussions by providing an environment that is less intimidating than the traditional classroom”); see also Randall D. Burks, *From Paper Chase to Cyberspace: A Case Study of Two Law Professors’ Perceptions of Their First Experience Team-Teaching a Multimedia Online Law School Course* (Aug. 2004) (unpublished Ph.D. dissertation, University of Nebraska), available at <http://digitalcommons.unl.edu/dissertations/AAI3147134/> (describing a study of two different online law school course offerings in which teachers and students reported results consistent with the description offered by the author here from twelve years’ worth of personal, weekly experience).

¹³⁸ These courses were further enhanced by adding a real-world deliverable—a client memorandum in one and a bench memorandum for an appellate judge in the other—both of which require original research, and are returned with extensive “Track Changes” commentary from the author. They are then discussed in an individual, extensive online conference, finally resulting in a substantial second draft (i.e., “re-write”) by putting the author’s comments to work in pursuit of holistic improvement. These courses therefore satisfy the upper-division writing requirement adopted by the faculty at the author’s law school, which itself had been crafted by the faculty in response to ABA Standard 302. See Kenneth D. Chestek, *MacCrate (In)Action: The Case for Enhancing the Upper-Level Writing Requirement in Law Schools*, 78 U. COLO. L. REV. 115, 118–19, 121–25 (2007) (discussing the 2001 amendment to Standard 302, “requiring, for the

The literature regarding online legal education has grown substantially since Professor Oliphant's pioneering article, as selected citations in the margin attest.¹³⁹ The literature on the creation and implementation of online LL.M. degree programs, given the fairly recent provenance of such programs, remains fairly modest; but with the present article to be counted among that number, it is growing.¹⁴⁰

The power of an online format for graduate-level legal education has not been lost on a number of U.K. and European based universities,¹⁴¹ and a Canadian university has also created an online LL.M. program.¹⁴² In the U.S., online American legal studies programs have emerged recently at Atlanta's John Marshall Law School,¹⁴³ Washington University School of Law in St. Louis,¹⁴⁴

first time, 'at least one additional rigorous writing experience after the first year.'") (quoting AM. BAR ASS'N SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS 24 (2001)). The author was particularly attentive to ensuring that the writing experiences met the stipulation of the 2005 amendment to Standard 302 making it clear that the writing is to be done "in a legal context," i.e., through the research, writing, and revision of a real-world client or legal workplace deliverable. *Id.* at 140–45.

¹³⁹ See, e.g., Perlin, *supra* note 135; Daniel C. Powell, *Five Recommendations to Law Schools Offering Legal Instruction over the Internet*, 11 J. TECH. L. & POL'Y 285 (2006); Cahak, *supra* note 135.

¹⁴⁰ See William H. Byrnes, *A Review of the Development of an Internet Delivered LL.M Program in the United States*, J. INFO. L. & TECH. (2001), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_3/byrnes/ ("[O]nline legal education is not only inevitable, but in fact [it is] already here in the United States . . ."); see also Perlin, *supra* note 135, at 106.

¹⁴¹ See *LLM Program Search*, LLM GUIDE, <http://www.llm-guide.com> (search "LL.M. Distance Learning") (last visited Jan. 29, 2014) (providing a long list of law schools around the world that offer distance learning courses).

¹⁴² See *Professional LLM Program*, OSGOODE HALL L. SCH., <http://www.osgoodepd.ca/pt-llm.html> (last visited Feb. 6, 2014).

¹⁴³ See *LL.M. in American Legal Studies—Online*, ATLANTA'S J. MARSHALL L. SCH., <http://www.johnmarshall.edu/llm/ll-m-in-american-legal-studies-online/> (last visited Feb. 4, 2014).

¹⁴⁴ See *Law School Goes Online with LL.M. in U.S. Law*, WASH. U. L. SCH., <http://law.wustl.edu/news/pages.aspx?id=9182> (last visited Jan. 26, 2014).

Thomas Jefferson School of Law,¹⁴⁵ Florida Coastal School of Law (FCSL),¹⁴⁶ and a handful of other law schools.¹⁴⁷ FCSL rolled out an entirely online LL.M. program in 2010,¹⁴⁸ which has been promoted to foreign-educated lawyers, including those who seek LL.M. credentials to qualify to take the bar examination in states that consider an LL.M. in determining whether a foreign-educated lawyer has sufficient instruction in American law and legal methods to be considered bar-examination ready.¹⁴⁹

¹⁴⁵ See *Master of Laws and Master of Science of Law Programs Online: Program Overview*, T. JEFFERSON SCH. L., <http://mastersinlaw.tjsl.edu/masters-in-law/program-overview/> (last visited Feb. 6, 2014).

¹⁴⁶ See *About the Program*, FLA. COASTAL SCH. L., <http://fcsl.edu/us-law-llm/about> (last visited Feb. 6, 2014).

¹⁴⁷ See Vicky Phillips, *Washington University Enters Top Online Law Degree Market*, GETEDUCATED.COM, <http://www.geteducated.com/hot-careers/justice-law-legal-studies/487-washington-university-online-law-degree> (last visited Feb. 6, 2013) (discussing the extent of online LL.M. degree programs).

¹⁴⁸ See Debra Cassens Weiss, *More Law Schools Offer Online LLM Programs*, A.B.A. J. (May 4, 2010 8:00 AM), http://www.abajournal.com/news/article/more_law_schools_offer_online_llm_programs/.

¹⁴⁹ See *About the Program*, *supra* note 146. At the beginning, FCSL marketed its program very aggressively. For example, FCSL issued a press release in which it claimed that in 2010, the first cohort in its program “enrolled” “47 students from 13 countries,” “who [were] all graduates of foreign law programs, enrolled from Japan, Korea, Singapore, Hong Kong, Australia, United Arab Emirates, France, Italy, Germany, Austria, Mexico, Canada, and Guyana,” as well as “U.S. residents who obtained their first degree in law from outside of the U.S.” Bus. Wire, *Coastal Law Recruiting Students for Second Year of Online LL.M. Program for Foreign Lawyers*, TMCNET.COM (July 1, 2011), <http://legal.tmcnet.com/news/2011/07/01/5612287.htm>. FCSL’s LL.M. program webpage boasted that one can “Earn a Masters Degree (LL.M.) in U.S. Law with just a computer and an Internet connection,” and prominently announced on its web site:

The tuition for the twenty-six (26) credit hour program is \$575 per credit hour. This is a fraction of the cost of residential LL.M. programs. Other than the cost of reading materials, there are no additional costs and no additional fees. Students can divide tuition payments into four affordable installments.

Tuition, FLA. COASTAL SCH. L., <http://fcsl.edu/us-law-llm/tuition> (last visited Nov. 1, 2011). This translates to program tuition of \$14,950, which FCSL says already includes all reading materials that are provided “entirely online.” *FAQs*, FLA. COASTAL LAW, <http://www.fcsl.edu/llm/faq.php> (last

Online components to legal education have grown.¹⁵⁰ They have become part of the accepted practice¹⁵¹—as reflected in the ABA Standards which, over the last 15 years, have increased the allowed distance learning hours toward a J.D. degree from zero to six to the current twelve,¹⁵² with fifteen hours proposed in a pending

visited Nov. 1, 2011). FCSL appeared to be positioning its online program in a way to attract the interest of foreign-educated lawyers seeking to obtain bar admission in a U.S. state:

Q: After graduating from the LL.M. program, will I be able to sit for the bar examination in the United States?

A: Yes, in select states. In the U.S., the fifty states and the District of Columbia each have their own rules with respect to bar admissions; there is no nationwide bar examination. Foreign law graduates with an LL.M. degree from Florida Coastal can qualify academically to apply to sit for the bar examination in California, Ohio, and select other states.

Some states have different rules depending on a lawyer's first law degree. So you should carefully consider the bar admission rules of any state where you are interested in sitting for the bar exam; each state bar has a website and is accessible by phone and by email. Contact Aron Mujumdar, the Program Director, for more information.

Id. New York's changes to Rule 520.6, however, do not bode well for online LL.M. degree programs as bar admission credentials, nor does the ABA's choice in the Model Rule to exclude online coursework, a choice that draws protest from FCSL. *See Foreign Legal Education*, N.Y. STATE BOARD L. EXAMINERS, <http://www.nybarexam.org/Foreign/ForeignLegalEducation.htm> (last visited Jan. 28, 2014); *See* Letter from C. Peter Goplerud, Dean, Fla. Coastal Law Sch., to Charlotte (Becky) Stretch, Assistant Consultant, A.B.A. (July 15, 2011), *available at* http://www.americanbar.org/groups/legal_education/resources/notice_and_comment.html. Thus, it is unsurprising that FCSL has dropped that original marketing approach and moved to a more temperate one. *See LL.M. MASTERS OF U.S. LAW*, FLA. COASTAL LAW, <http://fcsl.edu/us-law-llm> (last visited Feb. 6, 2014).

¹⁵⁰ *See* Henry H. Perritt, Jr., *The Internet is Changing the Face of American Law Schools*, 33 IND. L. REV. 253, 266–67 (1999).

¹⁵¹ *See e.g.*, Michael Heise, *Closing One Gap but Opening Another?: A Response to Dean Perritt and Comments on the Internet, Law Schools, and Legal Education*, 33 IND. L. REV. 275, 285–86 (1999).

¹⁵² Diana L. Gleason, *Distance Education in Law School: The Train Has Left the Station 2* (BEPress Legal Series, Working Paper No. 1762, 2006), *available at* <http://law.bepress.com/expresso/eps/1762> (noting that “the American Bar Association (ABA) Standard 306 on Distance Education

revision to the Standards.¹⁵³ As a result, online legal education has grown to offer opportunities to enhance ground-based legal education

stands firm since 2002, allowing just 12 hours of online instruction towards a J.D., and then only after a student has completed 28 credit hours of instruction,” and observing that “the change from zero to 12 units allowed toward a J.D. was a watershed decision that required a great deal of study and discussion”).

¹⁵³ AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REDLINE DRAFT AFTER NOVEMBER 2011 MEETING, Standard 311(f) (Proposed Draft 2011), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/jan2012/20111222_standards_chapters_1_to_7_post_nov11.aut_hcheckdam.pdf; see also Helen Leskovac, *Distance Learning in Legal Education: Implications of Frame Relay Videoconferencing*, 8 ALB. L.J. SCI. & TECH. 305, 323–24 (1998) (noting that before 1997, “[t]he Standards specifically prohibit distance learning in its earliest form of correspondence study,” and that “[c]onsequently, before a law school could experiment with distance learning programs using computer and telecommunications technologies, it had to seek a waiver or approval from the Accreditation Committee of the A.B.A.’s Section on Legal Education and Admission to the Bar or the Consultant on Legal Education,” but that in 1997, “[t]o facilitate experimentation, the A.B.A. . . . proposed Temporary Distance Education Guidelines, which waive the necessity of prior approval in most cases”); A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1999 n.195 (2012) (noting the ABA’s accreditation Standards Review Committee has proposed expanding to 15 hours the amount of online coursework creditable towards the J.D. degree). Michael Heise, *Closing One Gap but Opening Another? A Response to Dean Perritt and Comments on the Internet, Law Schools, and Legal Education*, 33 IND. L. REV. 275, 285–86 (1999). But see Perritt, *supra* note 150, at 271 (noting that while the ABA encourages experimentation, it prefers in-class experiences over other mediums). See A.B.A. Section of Legal Educ. & Admissions to the Bar, A.B.A., *Distance Education*, http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d.html (last visited Feb. 6, 2014). Section 306 applies only to J.D. degree programs; the Standards impose no direct regulation on distance education for LL.M. degree programs. *Id.* Under Standard 308, the only regulation of LL.M. degree programs is that:

[An ABA-approved] law school may not establish a degree program other than its J.D. degree program without obtaining the Council’s prior acquiescence. A law school may not establish a degree program in addition to its J.D. degree program unless the school is fully approved. The additional degree program may not

programs in numerous ways.¹⁵⁴ However, the developments by the New York State Bar¹⁵⁵ and the American Bar Association's Section of Legal Education and Admissions to the Bar¹⁵⁶ around equalizing legal educational backgrounds for foreign-educated lawyers have defined a narrower role for online coursework toward a qualifying LL.M. degree, and have precluded programs that are either entirely, or even substantially, delivered online.

That does not, however, mean that online programs have no role to play in American efforts to comply with the GATS obligations in the legal services sector.¹⁵⁷ Indeed, an online program to build bridges across legal and cultural gaps is a worthy endeavor in itself, and may also serve as a conduit for foreign-educated lawyers to obtain a grounding in American law and legal method that will help prepare them for entry into a ground-based American Legal Studies LL.M. program.¹⁵⁸

However, an entirely online LL.M. program will not presently qualify a foreign-educated lawyer to sit for the New York or California Bar Examinations. The New York Bar Examiners—whose exam is the most sought-after by foreign-educated lawyers¹⁵⁹—have implemented a new rule excluding all distance

from a law school's ability to maintain a J.D. degree program that meets the requirements of the Standards.

Id. at §308.

¹⁵⁴ See *Online, Distance Legal Education*, *supra* note 137, at 99–100 (describing the successful mental disability law program at NYLS); see also Gleason, *supra* note 152, at 5–9 (listing several advantages to integrating online learning into a course's curriculum).

¹⁵⁵ See N.Y. CT. R. § 520.6.

¹⁵⁶ See A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, PROPOSED MODEL RULE & CRITERIA ON ADMISSION OF FOREIGN EDUCATED LAWYERS (2011) [hereinafter ABA PROPOSED MODEL RULE & CRITERIA], available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20110420_model_rule_and_criteria_foreign_lawyers.authcheckdam.pdf.

¹⁵⁷ See generally GATS, *supra* note 12.

¹⁵⁸ See Jeffrey A. Van Detta, *A Bridge to the Practicing Bar of Foreign Nations—A Role for an Online Program as a Pipeline to a Qualifying, Ground-Based LL.M. Program in the U.S.* (forthcoming Fall 2013).

¹⁵⁹ See NAT'L CONFERENCE OF BAR EXAM'RS, 2012 STATISTICS 10–11 (2012), available at http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/8201132012statistics.pdf.

education LL.M.s from consideration in the Bar Examiner's process of determining whether a foreign lawyer qualifies to sit for the New York Bar Examination.¹⁶⁰ Nor can any of the credits and courses required for LL.M. recognition in New York come from distance learning.¹⁶¹ Moreover, the most important rule on the horizon—the ABA Section on Legal Education's Proposed Model Rule on Admission of Foreign Educated Lawyers and Proposed Criteria for ABA Certification of an LL.M. Degree for the Practice of Law in the United States—also entirely excludes online education.¹⁶² Although the rules governing education and admission standards in California are multi-layered and require one to sort through the hierarchy of a quartet of sources, they do not appear to regard an LL.M. degree earned through an online program as qualifying.¹⁶³ California's rules

¹⁶⁰ See N.Y. CT. R. § 520.6(b)(3)(viii).

¹⁶¹ See *id.* at § 520.6(b)(3)(viii).

¹⁶² See ABA PROPOSED MODEL RULE & CRITERIA, *supra* note 156, at 4–7 (requiring the completion of a LL.M. program that has been certified by the Council, which as of now, no online LL.M. programs are certified by the ABA).

¹⁶³ See CAL. BUS. & PROF. CODE § 6060 (2003); CA. ST. RULES OF STATE BAR RULE 4.30 (2008). Rule 4.30 states that:

Persons who have studied law in a law school in a foreign state or country may qualify as general applicants provided that they

(A) have a first degree in law, acceptable to the Committee, from a law school in the foreign state or country and have completed a year of legal education at an American Bar Association Approved Law School or a California accredited law school in areas of law prescribed by the Committee; or

(B) have a legal education from a law school located in a foreign state or country without a first degree in law, acceptable to the Committee, and

(1) have met the general education requirements;

(2) have studied law as permitted by these rules in a law school, in a law office or judge's chambers, or by any combination of these methods (up to one year of legal education credit

apparently add up to require that anyone who obtains a degree—whether J.D. or LL.M.—from a program not accredited by the ABA or California Board of Bar Examiners, must submit to the First Year Law Students' Examination (FYLSE) (colloquially and unaffectionately known as “the Baby Bar”), and that only one year of legal education may be counted before that examination is passed by a bar aspirant.¹⁶⁴ Moreover, California's rules do not appear to extend even the opportunity provided to graduates of unaccredited programs outside of California to take, and pass, the FYLSE¹⁶⁵

may be awarded for foreign law study completed); and
(3) have passed the First-Year Law Students' Examination in accordance with these rules and Committee policies.

Id. See also Memorandum from the State Bar of Cal. Comm. of Bar Exam'r/Office of Admissions on Guidelines for Implementation of Chapter 2, Rule 4:30 of the *Admission Rules* (n.d.), available at <http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=1tegD1eQse0%3D&tabid=2267>. See generally *Qualification for Admission to Practice Law in California by Law Students Receiving their Legal Education Outside of the United States*, FOREIGN EDUCATED BULL. (State Bar of Cal., San Francisco, Cal.), (n.d.), available at <http://www.calbar.ca.gov/portals/0/documents/es76100.pdf>. But see *LLM in United States Legal Studies*, JOHN F. KENNEDY UNIV., <http://www.jfku.edu/Programs-and-Courses/College-of-Law/Department-of-Law/Programs/LLM-US-Legal-Studies.html> (last visited Feb. 4, 2014) (displaying the claims made for the online LL.M. degree in U.S. Legal Studies offered by the John F. Kennedy University School of Law located in San Francisco, a school accredited by the California Board of Bar Examiners).

¹⁶⁴ See Andrew S. Rosen, Chief Operating Officer, Kaplan Educ. Cntrs., *Concord University School of Law's On-Line Law Degree Program* (Spring 2001), in 15 ST. JOHN'S J. C.R. & ECON. DEV. 311 (2001) (describing how graduates of Concord Law School must take and pass the FYLSE at the end of their first year of online law study, because the California Bar Examiners, like the ABA, have no rules by which to measure accreditation of online programs of legal education). The FYLSE is the single longest day of bar testing in the United States, and statewide bar pass rates among the examinees from a dozen or so registered, but unaccredited, schools (the rest of which are brick-and-mortar) hover in the 20%–25% range. See, e.g., Ray Hayden, *Passing the First Year Law Students' Exam*, YAHOO!VOICES (Jan. 4, 2013), <http://voices.yahoo.com/passing-first-year-law-students-exam-fylse-fylse-11945685.html>.

¹⁶⁵ See, e.g., Stephen Gillers, *A Profession, if You Can Keep It: How Information Technology and Fading Borders are Reshaping the Law*

during law school as a means for qualifying to sit for the California Bar Examination without the credential of a J.D. from either an ABA-approved or a California Board of Bar Examiners-approved law school. For present purposes, it suffices to observe that the trend in using LL.M. degrees as an important element of bar-examination qualification for foreign lawyers seems to be moving in a direction opposite from the establishment of entirely online LL.M. programs. With New York having just changed its rules to exclude online coursework and degrees from consideration, and with the proposed ABA Model Rule and Qualifying LL.M. degree standards also excluding online course work,¹⁶⁶ an entirely online program is unlikely to be competitive for foreign-educated lawyers who (a) primarily want the LL.M. degree for U.S. bar-examination eligibility and (b) are well-informed about the actual requirements for using the LL.M. in this way.

An online LL.M. program can be invaluable, however, to a foreign-educated lawyer who is trying to make the very crucial decision about whether the investment in a ground-based LL.M. program in the U.S. is worth the financial, professional, and personal

Marketplace and What We Should Do About It, 63 HASTINGS L.J. 953, 963 & n.39 (2012) (detailing how California still allows lawyers to take the bar in hopes of “hang[ing] out a shingle” if the out-of-state bar aspirant studied in a judge’s chambers or law office for at least four years); Robert M. Jarvis, *An Anecdotal History of the Bar Exam*, 9 GEO. J. LEGAL ETHICS 359, 368 (1996) (stating that one of the reasons why California requires the FYLSE is to protect its bar from those who are unqualified). *See generally* Memorandum from The Comm. of Bar Exam’r/Office of Admissions on Description and Grading of the California First-Year Law Students’ Examination (n.d.), available at <http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=6wG-dLiu8Hk%3d&tabid=2254&mid=3131>; *First-Year Law Student’s Examination Instructions*, STATE BAR CAL., http://www.calbarxap.com/applications/CalBar/info/first_year_exam.html (last visited Feb. 5, 2014).

¹⁶⁶ *See* Letter from C. Peter Goplerud, Dean, Fla. Coastal Law Sch., to Charlotte (Becky) Stretch, Assistant Consultant, A.B.A. (July 15, 2011), available at http://www.americanbar.org/groups/legal_education/resources/notice_and_comment.html (criticizing this exclusion of distance-education courses and programs from the Proposed LL.M. qualification and arguing that “the ABA should grand-father the LL.M. Program for International Lawyers at Florida Coastal School of Law,” because “Requirement (4) would take away the value of what the Section of Legal Education previously provided to Florida Coastal when acquiescing in its LL.M. Program for International Lawyers”).

commitment and sacrifice that a foreign-educated lawyer will have to bear by interrupting one's legal career at home in order to attend such a program for a year or more in the United States.¹⁶⁷ Globally, lawyers are looking for more value from LL.M. degrees.¹⁶⁸ In addition, foreign lawyers will benefit little more from the currently popular talking-head approach of online education, called Massive Open Online Courses (MOOCs),¹⁶⁹ than the old "large lecture hall approach," which lacks the kind of interactive and individualized learning that lawyers both need and want, and thus can give them but little insight.¹⁷⁰

In the next section, we examine how such an online LL.M. program might be conceived and structured to those ends. The promise for reaching out to foreign lawyers to provide opportunities for study and dialogue about developing their home country's legal systems lies primarily in the powerful interconnectivity provided by online learning forums made possible by the Internet.¹⁷¹ We will also

¹⁶⁷ See Van Detta, *supra* note 158.

¹⁶⁸ See, e.g., Alex Aldridge, *Law Students: 'And What Else Do I Get with My Masters?'*, THE GUARDIAN (Oct. 4, 2012, 4:00 AM), <http://www.theguardian.com/law/2012/oct/04/legal-education-llm-law-schools>.

¹⁶⁹ Nora V. Demleitner, *The Challenges to Legal Education in 1973 and 2012: An Introduction to the Anniversary Issue of the Hofstra Law Review*, 40 HOFSTRA L. REV. 639, 650 (2012) (describing MOOCs as a way for law schools to join "the online market and mak[e] their best faculty and lecturers available to a broad audience across the globe").

¹⁷⁰ See, e.g., Philip G. Schrag, *MOOCs and Legal Education: Valuable Innovation or Looming Disaster?* VILL. L. REV. (forthcoming 2013) (recognizing that MOOCs would have to be supplemented by considerable, small-group, on-site work under mentor supervision in order to be viable in legal education). Cf. Jacob J. Walker, *Why MOOCs Might Be Hindered by the Definition of Correspondence Education*, SOC. SCI. RES. NETWORK EJOURNAL (Jan. 28, 2013), <http://ssrn.com/abstract=2208066> (acknowledging that "MOOCs don't necessarily have a lot of interaction with the instructor, as the instructor has often been pre-recorded, and cannot interact with each of the hundreds of thousands of students who enrolled"). See generally Todd E. Pettys, *supra*, note 135 (discussing MOOCs in a broader context of technology in legal education); Warren Binford, *Envisioning a 21st-Century Legal Education*, 41 WASH. U. J.L. & POL'Y (forthcoming 2013), available at <http://ssrn.com/abstract=2280250>.

¹⁷¹ See Michael L. Perlin, *An Internet-Based Mental Disability Law Program: Implications for Social Change in Nations with Developing Economies*, 30 FORDHAM INT'L L.J. 435 (2007) (providing one of the clearest prior recognitions of this in the law-review literature); see also Michael L.

consider the particular promise that global forums for study and dialogue about the American legal experience offer to large segments of the practicing bars of foreign nations, lawyers who would otherwise be legally landlocked by the time and space boundaries of their countries of abode.

IV. BOTH A BRIDGE AND A PIPELINE: BUILDING A GLOBAL FORUM FOR AMERICAN LEGAL STUDIES ONLINE

The costs of studying in a ground-based LL.M. program in the U.S. are daunting for the average foreign lawyer.¹⁷² Indeed, the costs for ground-based U.S. LL.M. degree programs have become high enough that a growing number of U.S. law school graduates are seeking LL.M. degrees and initial employment in the larger cities of China.¹⁷³ For example, the LL.M. degree program at Valparaiso Law School in Indiana advises foreign-educated lawyers that the cost of tuition, living expenses, and required insurance—computed only for the 28 weeks in which classes are in session—is valued at about \$51,000.¹⁷⁴ However, a more realistic estimate of total out-of-pocket costs, including all living expenses and travel costs, is likely to bring

Perlin, Heather Cucolo & Yoshikazu Ikehara, *Online Mental Disability Law Education, a Disability Rights Tribunal, and the Creation of an Asian Disability Law Database: Their Impact on Research, Training and Teaching of Law, Criminology Criminal Justice in Asia*, 1 ASIAN J. LEGAL EDUC. (forthcoming 2013); *Online, Distance Legal Education*, *supra* note 137.

¹⁷² See, e.g., Kian Ganz, *Opportunities Sparse for US LLM Degree Holders*, LIVE MINT (Jan. 19, 2012, 11:09 AM), <http://www.livemint.com/Politics/vwxMkpnOt5UF28WE5QYNpM/Opportunities-sparse-for-US-LLM-degree-holders.html> (estimating costs of studying in NYC for a Columbia LL.M. degree during 2011–2012 as approaching \$80,000).

¹⁷³ See *US Students Going to China to Earn an LL.M.*, LL.M. ROADMAP (Apr. 24, 2013), <http://www.llmroadmap.com/1/post/2013/04/us-students-going-to-china-to-earn-an-llm.html> (reproducing Tom Brennan, *The China Option*, THE AM. LAW. (Apr. 22, 2013, 7:29 AM), http://www.americanlawyer.com/id=1202596988344&The_China_Option/slreturn=20130326225451).

¹⁷⁴ See *International J.D./LL.M. Applicants*, VAL. U. L., <http://www.valpo.edu/law/prospective-students/p-applying-to-valparaiso/p-international-applicants> (last visited Feb. 6, 2014).

the total cost to over \$75,000,¹⁷⁵ not including any regular income lost in their home country because they are not working while studying in the U.S. In the more expensive New York City area, Hofstra's American Legal Studies full-time program costs almost \$48,000 in tuition and fees alone,¹⁷⁶ not taking into account the much higher living expenses.¹⁷⁷

Thus, for many foreign-educated lawyers practicing in their home countries, LL.M. study in the U.S. may be beyond their reach, both financially and practically. This is a great shame. Almost two hundred years ago, Alexis de Tocqueville made a number of penetrating insights into the role of America as a republic in sustaining the rule of law.¹⁷⁸ The essence of his observations today provides strong evidence that it is through winning the hearts and minds of a country's legal profession that the rule of law enjoys the

¹⁷⁵ See, e.g., *Frequently Asked Questions for International JD Applicants*, Harvard Law Sch., <http://www.law.harvard.edu/prospective/jd/apply/international-applicants/intlfaq.html> (last updated Sept. 05, 2013) ("US law school may seem very expensive. At Harvard Law School in 2013-14, the annual tuition is \$52,350. Harvard then suggests a budget of another \$26,000 for everything else (travel, books, accommodation, living expenses, health insurance), resulting in a total annual cost of over \$78,000."); *LLM Estimated Expenses for the Academic Year 2014-2015*, U. PA. L. SCH., <https://www.law.upenn.edu/admissions/grad/tuition-fees.php> (last visited Feb. 6, 2014) (estimating the total annual cost to be over \$78,000). As both the Harvard and University of Pennsylvania calculations demonstrate, these figures do not include all of the living expenses one would expect to incur, nor do they include the cost of travel, either to and from one's home country, or even travel within the U.S. itself; nor do the figures include expenses for dependents who may have no other viable choice but to accompany the foreign lawyer to the U.S. Furthermore, as the University of Pennsylvania admonishes its international LL.M. students, "Unfortunately, we cannot provide financial assistance to most of our LLM students." *Financing Your Education*, U. PA. L. SCH., <https://www.law.upenn.edu/admissions/grad/financing-your-education.php> (last visited Feb. 6, 2014).

¹⁷⁶ *LL.M. FAQs*, HOFSTRA SCH. L., <http://law.hofstra.edu/academics/degreeprograms/llmprogram/faq/> (last visited Feb. 6, 2014).

¹⁷⁷ See *Cost of Attendance Budgets*, HOFSTRA SCH. L., <http://law.hofstra.edu/admissions/financialaid/faqs/cost/> (last visited Feb. 6, 2014) (estimating the living expenses during the nine-month academic year in 2012-13).

¹⁷⁸ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Ch. XVI (Henry Reeve trans., 1838).

best chances of arising and being sustained.¹⁷⁹ If anything, the world history of the 20th and 21st centuries has proven an unalienable truth that flows from de Tocqueville's antebellum observations: the kind of rule of law that succeeds in a country depends to a great degree on the attitudes and values of its legal professionals. There have been

¹⁷⁹ See *id.* Among his important observations concerning the American legal profession circa the 1830s, the following are particularly relevant to our present subject:

The more we reflect upon all that occurs in the United States the more we shall be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element. In that country we easily perceive how the legal profession is qualified by its attributes, and even by its faults, to neutralize the vices inherent in popular government. When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counselors. . . .

The influence of legal habits extends beyond the precise limits I have pointed out. Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings[.] As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate. The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it . . .

Id. at 261.

more than a few instances in which the realization of the rule of law in a country has been to create a rule of law that denies individual human rights, puts divisive and destructive ideologies above the values of truth and liberty, and even facilitates and purports to legitimize the worst of crimes and atrocities against less politically or economically empowered groups and institutions.¹⁸⁰ It is by bringing free and open conversation about the rule of law to the legal profession in other nations that an American law school can make a real and lasting contribution to promoting the best of what the rule of law concept has to offer and to minimize the misuse of the rule of law concept in support of lawless objectives.¹⁸¹

*A. THE CONCEPT OF A GLOBAL FORUM IN WHICH FOREIGN LAWYERS
STUDY U.S. LAW*

In conversations and meetings with members of the bar and business communities in other countries, it is striking how both sectors express an interest in studying American legal institutions and American innovations in the law. Those professionals regularly speak of the desire to take what is best from the American legal

¹⁸⁰ Such perverse misuses of the rule of law concept are explored in detail in scholarly works. See, e.g., MATTEI & NADER, *supra* note 32; INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., Harvard Univ. Press 1991) (1987); RAJAH, *supra* note 32; see also MANDERSON, *supra* note 32, at Ch. 5.

¹⁸¹ As de Tocqueville further observed of the legal profession in America:

The profession of the law is the only aristocratic element that can be amalgamated without violence with the natural elements of democracy and be advantageously and permanently combined with them. I am not ignorant of the defects inherent in the character of this body of men; but without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion to the power of the people.

DE TOCQUEVILLE, *supra* note 178, at 257; see also Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 253–56 (1992).

tradition, and apply it to the rapidly developing and maturing legal systems of their own countries. They seek not to simply mimic American laws or legal institutions, but rather to gain a practical understanding of the laws that will inform their own thinking about laws and legal institutions in their own nations.

Their desire suggests a cognizable demand by foreign-educated lawyers—in private practice, government service, and private industry—for opportunities to study American legal subjects. Among foreign attorneys, some are considering whether they want to undertake the daunting task, described in Section III, *supra*, of turning their lives and law practices upside down in the short run in order to gain a bar-qualifying, ground-based LL.M. and thereafter gain admittance to the bar of one or more U.S. jurisdictions. This process enhances their credibility and creditability of their law practices at home, where business clients seek knowledgeable counsel credentialed in transnational law within the globalized marketplace. Given the distances and expenses involved, these professionals want to test the waters, so to speak, with opportunities to engage in such studies online.¹⁸²

¹⁸² See generally Perritt, *supra* note 150, at 265–70 (describing the process in its inception days that has lead legal education to seek out new horizons in the virtual world). Professor Perritt also discusses how accreditation rules designed for brick-and-mortar schools have slowed experimentation in legal online education but explains that, nonetheless, there is the opportunity for employing a progressive dynamic:

It is important to understand the relationship between [delivering course work in legal education online] and accreditation. Accreditation is a standardization and minimum quality control system. It is not meant to be the source of innovation. It may be that new technologies make available teaching techniques that should cause accreditation rules to be changed. The legal academy will never know what those are if experiments only take place within a conservative estimate of what the accreditation rules allow. Accordingly, an essential part of any proposal is that it be bold and essentially uninhibited by existed accreditation standards. Law schools must be willing testing grounds. This does not suggest defiance of accreditation rules or bodies; instead, it suggests taking a prominent leadership position in the current A.A.L.S. and ABA task forces which are developing an

We might very well reify the objective heard in the phrase “global forum.” In creating a concept, and content, for such a global forum, the term “forum” is a critical one and an excellent choice of description of what this program should be.¹⁸³ The concept of *forum*

understanding of the relationship between distance learning technology and sound education.

Id. at 271. “The door to distance education in law schools cracked open in August 2002 when the ABA revised its Standard 306 to specifically permit the limited use of distance education courses.” Powell, *supra*, note 139, at 288 & n.15 (citing A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 306). As another legal educator recently observed:

[An] issue that is not at the top of the legal education reform agenda, but is one that I think, in many ways, is the most potentially subversive (I say that as a good thing) and the one that has the greatest potential for causing significant ameliorative and transformative social change. I speak here of the turn to online, distance learning, legal education. And to make it clear: I write this somewhat self-consciously and self-referentially as I have created such a program . . . through which [the educator’s home institution] now offer[s] thirteen courses, a Masters degree and an Advanced Certificate in mental disability law studies.

Perlin, *Online, Distance Legal Education*, *supra* note 137, at 96. For an interesting discussion of the complicated relationship between technology and legal innovation, see Ezra Dodd Church, Note, *Technological Conservatism: How Information Technology Prevents the Law From Changing*, 83 TEX. L. REV. 561 (2004).

¹⁸³ The concept of a global forum for studying U.S. law is quite distinguishable in purpose and content from what some refer to as a *global law forum*. The kind of global forum under consideration in this Article is not for discussing something called “global law.” Rather, it is a forum in which foreign-educated lawyers may study and dialogue with American counterparts about American law. It should be carefully distinguished from an established program which uses that name:

The Global Law Forum at the Jerusalem Center of Public Affairs was established to revitalize public discourse concerning Israel and the Middle East by producing up-to-date materials explaining international law dimensions of current regional controversies, and to enrich the study of international law by reconsidering and re-analyzing the fundamental principles and applications of international law, particularly regarding issues of concern to Israel and the Middle East.

signifies a law school's intention to create a context of conversation and discussion among American lawyers and their foreign counterparts.¹⁸⁴ A global forum should be first, and foremost, a learning community. Within that learning community, a conversation is facilitated among the foreign lawyers and their American counterparts on a law school's faculty teaching within the program. The dialogue will concern the American legal system itself, which will allow the global forum to enable students to contextualize within their framework of the legal systems and traditions of the countries from which the LL.M. degree students hail.

The objective of this kind of global forum program should eschew a "comparative" or "trans-national" law program, where the object is the creation of a global forum for the study of American law. Thus, such a program should be a forum for lawyers and other legal professionals in other nations to gather online to study American law. That study will be of use to lawyers and legal professionals in three specific ways:

- (1) in their own law practices or law-related work in their home countries, as well as the decision whether to further enhance their law practice or law-related work by studying in a ground-based

International Law, JERUSALEM CENTER. FOR PUB. AFF., <http://jcpa.org/about/> (last visited Feb. 6, 2014); see also *American Bar Association Forum to Highlight International Business Law, Financial Reform Issues*, AM. B. ASS'N (Sept. 13, 2011, 10:00 AM) http://www.americanbar.org/news/abanews/abanews-archives/2013/08/american_bar_association12.html (announcing a conference called the "Global Business Law Forum," which was held in London in 2011). The Association of Chartered Certified Accountants (ACCA) maintains on its website a number of global forums. See *ACCA's Global Forums*, ACCA, <http://www.accaglobal.com/gb/en/research-insights/global-forums.html> (last updated Feb. 6, 2014). A recent online initiative at UCLA Law School is also often popularly called the "Global Law Forum." See, e.g., Kenneth Anderson, *ICC Prosecutor's Office and UCLA Online Global Law Forum*, VOLOKH CONSPIRACY (Sep. 21, 2010, 8:00 AM), <http://volokh.com/2010/09/21/icc-prosecutors-office-and-ucla-online-global-law-forum/> ("UCLA Law School's Sanela Diana Jenkins Human Rights Project has launched a new partnership with the International Criminal Court Office of the Prosecutor, to create an online forum for discussing legal issues that might or have arisen for the prosecutor. The forum is at UCLALawForum.com.").

¹⁸⁴ A forum is "[a] public place, esp. one devoted to assembly or debate." BLACK'S LAW DICTIONARY 725 (9th ed. 2009).

LL.M. program, which would qualify them to take a bar examination in a number of American jurisdictions;

(2) in the commercial development of their nations during the era of global trade; and

(3) in the building of their nations under the rule-of-law concept.¹⁸⁵

Starting with this concept, the creation of the program—and the courses within it—may be divided into the discrete tasks that must be accomplished. This schema of tasks helps to more accurately estimate the commitment of time and resources involved in producing the relevant and high-quality product that foreign lawyers are expected to seek. These steps are set out in Section IV.B, *infra*. The author developed these processes with a dozen years of experience in online legal education, and they serve as a model not only of the process for fleshing out a global forum program, but also of the basic process for planning online graduate law courses generally.

B. DEVELOPING AN ONLINE AMERICAN STUDIES PROGRAM

Having worked on developing a total of at least fourteen online law courses, the author has gained a body of insight and development process knowledge from his experience that he shares in this section. Based on the author's very substantial online course development experience, the following describes his view of the process by which he has developed online versions from the brick-and-mortar courses that the author teaches—courses that are to be offered originally and exclusively online—and online LL.M. programs:

¹⁸⁵ At the same time, the global forum concept prevents the appearance noted by some foreign scholars in assessing, for example, the ABA's recent consideration of a proposal to begin accrediting foreign law schools. See Larry Catá Backer & Bret Stancil, *Globalization Versus Legal Colonialism in the Internationalization of Legal Education: Thoughts on the Proposed Certification of U.S. LL.M. Programs*, L. END DAY, (July 1, 2011), <http://lcbackerblog.blogspot.com/2011/07/globalization-versus-legal-colonialism.html>.

I. The Tasks

A. Programmatic Level

1. Develop the themes of the program in consideration of (a) the needs of the target audience(s), (b) the unique qualities of American legal education, and (c) the unique qualities of legal education as it is offered at a host law school.
2. Realize those themes in proposing specific courses to fit within the curriculum. Among other tasks, this will require a study and comparison to other post-J.D. programs offered by other American and Canadian law schools.
3. Develop the content of the program by establishing Ultimate Program Objectives (UPOs) and Ultimate Course Objectives (UCOs)—this requires more than listing a group of reading assignments. UCOs will need to be developed, with the global law student in mind, for the program as a whole and for each course within the program. Each course does not have to achieve every UPO; but, in aggregate, each course should fairly represent all UPOs.¹⁸⁶

¹⁸⁶ These steps are essential to the kind of outcome measurement that is on the way to becoming an ABA accreditation requirement for American law schools, as it is already a requirement with various regional accreditors. See Mary A. Lynch, *An Evaluation of Ten Concerns about Using Outcomes in Legal Education*, 38 WM. MITCHELL L. REV. 976 (2011) (providing a very detailed, comprehensive, and illuminating study of the movement for outcome measures in legal education). Professor Lynch discusses the origins of the movement into a pair of books published in 2007 on the best practices in legal education, and the subsequent study and embrace of their suggestions through the work of a Special Committee on Output Measures and the Standards Review Committee (SRC) on ABA Approval Standards, both under the auspices of the ABA Section on Legal Education and Admissions to the Bar noting that “[i]n July 2011, the SRC finalized proposals to require accredited law schools to ‘identify, define, and disseminate’ anticipated student learning outcomes and to assess student learning and institutional effectiveness.” *Id.* at 977–82. See Steven I. Friedland, *Outcomes and the Ownership Conception of Law School Courses*, 38 WM. MITCHELL L. REV. 947 (2011) (providing a macro-level view of how

4. Develop the course sequencing in light of the UPOs and the UCOs.

5. If the school plans to make these courses available to current J.D. program students for academic credit, the course designers will need to review the program and each course within it for contact hour requirements and ABA standards for online coursework. Modifications may need to be made to permit the offering of these courses in the J.D. program, as opposed to the LL.M. or Certificate program.

B. Course Level

1. Prepare the syllabus, which is a time-consuming undertaking with discrete sub-steps:

(a) Select reading materials (a more complex task for this kind of program than for the average law school course, where offerings are “pre-packaged” and the syllabus is often determined by subject outlines of the National Conference of Bar Examiners or state bar examiners). The reading materials must provide direct support to the UPOs, UCOs, and course assignments. Typical law school classes are primarily focused on learning modes of legal argument and legal analysis. The global forum program, like other law and business programs aimed at audiences not preparing for professional licensure examinations, needs to focus on student

an outcomes assessment emphasis will affect American legal education). *See also* Janet Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225 (2011). In addition, the process of designing and articulating UPOs and UCOs is central to the kind of comprehensive “curriculum mapping” that many law schools are undertaking; *see, e.g.*, Debra Moss Curtis & David M. Moss, *Curriculum Mapping: Bringing Evidence-Based Frameworks to Legal Education*, 34 NOVA L. REV. 473 (2010).

absorption of information and the use of that information in course deliverables. Since one of the UPOs that has been discussed is acquainting foreign lawyers with American legal concepts for the purpose of allowing them to adapt those concepts to the unique evolution of law in their home countries, the alignment between readings and chosen materials in the online environment must be much closer than in the typical law school classroom.

(b) Develop units of assignments out of those materials that logically sequence topics according to both course UCOs and program UPOs. This is a critical phase to ensure coherence, both vertically (within the course) and horizontally (throughout the program).

2. Develop the course deliverables (i.e., interim and final assessments or assignments): Unlike traditional brick-and-mortar classroom courses, online students expect, demand, and need deliverables that will be completed and assessed with detailed commentary during the course period. The brick-and-mortar model of end-of-course examination assessments is much less efficacious in the online environment and is unlikely to appeal to lawyers and legal professionals interested in post-graduate online coursework.

(a) Develop 3–5 individual projects to be submitted via a drop-box. These will require research and writing using the course books and web-based resources. They will take the form of a memorandum, a white paper, a letter, and the like. Each project should require sufficient substance to demonstrate understanding of key concepts, which is better measured by word-count than page-

count. To demonstrate that level of understanding, a participant's paper, in the author's experience, generally needs to be at least of 2,500 words.

(b) Develop 5–10 discussion forum assignments. These assignments should require reflection, writing, and some research, and should provide students with the opportunity to comment intelligently on aspects of American law from their own cultural perspective.¹⁸⁷

(c) Consider developing a team project for each course, working in teams of 3–5. Students will build community within the

¹⁸⁷ Such discussion assignments are the kind of valuable tools that help participants get beyond merely learning what the law is to the more fundamental, and more important, questions of why the law is as it is and what cultural, social, and historical biases have contributed to that development. See Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1222–23 (2008). As the author's long-time colleague, Professor Lucille Jewel, most aptly put it:

These modest suggestions [including collaborative learning] are oriented toward bringing legal education closer in line with democratic, egalitarian ideals. The hope is that law graduates will contribute to an enlightened evolution of the law through critical reflection—on not merely what the things are that lawyers do, but also why lawyers do the things they do. By getting students to see and discuss the hidden processes within our legal institutions, we can develop a critical discourse which will, hopefully, chip away at the ingrained habitus, the invisible glue that holds our unequal society together. Specifically, if students develop a sufficient awareness of the suffering that the current legal system continues to cause, despite advances during five centuries in America, the hope is that they will see the ways in which their participation in the system contributes to the subordination of persons of lesser status and will seek alternatives to the existing structures.

Id. at 1223 (footnotes omitted).

class, add a collaborative learning element to each course, and pave the way for better success in a ground-based LL.M. program for those participants inspired to pursue further study in residence and thereafter seek bar admission.¹⁸⁸

(d) Consider whether to include a capstone project for each group of three courses to consist of a group memorandum and presentation by video conferencing. Such a capstone project should synthesize the learning from the three courses in application to a legal and business problem. The interim capstone project attached to specific groups of courses holds great promise for addressing one of the most important challenges in 21st century legal education: the “transfer of knowledge” in which learners “identify and transfer skills from one learning environment to another,” which “is at the

¹⁸⁸ The author has published an extensive examination of collaborative learning among adult professionals in the legal studies context. See Jeffrey A. Van Datta, *Collaborative Problem-Solving Responsive to Diverse Learning Styles: Labor Law as an Active Learning Experience*, 24 N.C. CENT. L.J. 46 (2001). The author’s work in this area has been cited by other scholars in a variety of related settings, including the following: (1) other scholarship that has considered various aspects of collaborative learning for law students, see, Mary Keyes & Kylie Burns, *Group Learning in Law*, 17 GRIFFITH L. REV. 357, 360 (2008); and (2) scholarship in the broader category of active learning approaches that are particularly well-suited to adult learners, see, Linda S. Anderson, *Incorporating Adult Learning Theory into Law School Classrooms: Small Steps Leading to Large Results*, 5 APPALACHIAN J.L. 127, 148 (2006); Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 4, 5 (2004); Eric A. DeGraf, & Kathleen A. McKee, *Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles*, BYU EDUC. & L.J. 499, 505 (2006). The author also notes that specific techniques for effectuating collaborative, or “team based,” learning have also been the subject of a very recent article. See Janet Weinstein et al., *Teaching Teamwork to Law Students*, 63 J. LEGAL EDUC. 36 (2013).

very essence of what lawyers do every day.”¹⁸⁹

3. Develop extensive, custom-made course materials, which synthesize aspects of the course to enhance the student’s ability to achieve UCOs and UPOs. While not as commonly done in brick-and-mortar environments, course materials to supplement student reading is especially valuable in online learning communities to help students develop a hierarchy of course knowledge and a strategic template for sorting the details of each course. The course materials need to transcend changes in texts, and need to provide a basis for the course facilitators to enhance the learning experience beyond the textbook and casebook readings. They may even replace casebooks and textbooks in a global forum course entirely.¹⁹⁰

4. Develop relevant web links, which are keyed directly to the course deliverables. These should guide online students to important materials that will permit the students to delve deeper into the nuances of each assignment. Web links also permit continuous updating of course content, particularly during the hiatus between editions of published casebooks and textbooks. In addition, wisely chosen web-accessible material can, in many courses, replace a published casebook or textbook.¹⁹¹ This use of web links offers two

¹⁸⁹ Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education*, 34 SEATTLE U. L. REV. 51, 51–52 (2010).

¹⁹⁰ See, e.g., Lydia Pallas Loren, *The Viability of the \$30 (or Less) Casebook* (Lewis & Clark Law Sch., Working Paper No. 19, 2013), available at <http://ssrn.com/abstract=2268057> or <http://dx.doi.org/10.2139/ssrn.2268057>.

¹⁹¹ As one experienced American law school dean recently observed: Casebooks are another anachronism. They were important when copying was difficult and there was no way for every student in the class to have access to cases in the library at the same time. Now, students can easily find cases and statutes in electronic format, and the class can be tailored to the individual professor’s needs.

advantages. First, there is a considerable amount of cost savings¹⁹² to the foreign student, both in terms of book price and the transactional costs in making sure that delivery is effectuated in foreign nations and sometimes geographically remote regions.¹⁹³ Second, since almost every casebook and textbook is written for a target audience of American J.D. students, a customized selection of web-based materials allows course designers and course professors to tailor the learning materials to foreign lawyer participants generally, and even to the individual needs of specific cohorts as they progress through a global forum program.¹⁹⁴

Richard Gershon, *In Ten Years, All New Law Schools!*, 44 U. TOL. L. REV. 335, 344 (2013); see also W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 22–23 (1998) (discussing the intellectual and practical needs attendant to Professor Langdell's invention of the law school casebook); Bruce A. Kimball, "Warn Students that I Entertain Heretical Opinions, Which They are Not to Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C.C. Langdell, 1870–1883, 17 LAW & HIST. REV. 57 (1999) (discussing Langdell's challenges in assembling a uniform set of selected cases for study by his students). Dean Gershon also discusses an initiative proposed by the Center for Computer-Assisted Legal Instruction (known by its acronym, CALI), which "envision[s] a way for law schools to save their students \$150 million by creating and sharing e-books on a free server." Gershon, *supra* at 343. Under CALI's program, "every law school would donate a fellow who will participate in a team of faculty to write a casebook in a substantive area of law over twelve months," and if each of the 201 ABA-approved law schools contributed one faculty fellow, "the 201 fellows would have a goal of 100 free casebooks." *Id.* at 343–44 (citation omitted).

¹⁹² See Gershon, *supra* note 191, at 343–44; cf. Loren, *supra* note 190, at 1 (observing that "[i]t is not uncommon for a new hardbound copy of today's law school casebooks to exceed \$200," and that "each year, the prices inch ever higher").

¹⁹³ For example, an online American legal studies program in which the author teaches includes a high court justice from a Micronesian nation.

¹⁹⁴ See Gershon, *supra* note 191, at 344. For a perspective on problems of homogeneity in approach arising from the law school casebook market, see Lynne Marie Kohm & Lynn D. Wardle, *The "Echo-Chamber Effect" in Legal Education: Considering Family Law Casebooks*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 104 (2011). Several observations of Professors Kohm and Wardle are of especial relevance in this context:

5 Develop curriculum guides for use by the facilitators of each course.¹⁹⁵ Curriculum guides

When alternative viewpoints, opinions, and arguments are significantly absent from any community, particularly a university or law school community, it results in an “echo-chamber effect.” The lack of intellectual diversity results in the community hearing only itself, hearing the ideas it wants and expects to hear, and hearing nothing but echoes of the arguments, and viewpoints it prefers and supports. Consequently, the discourse in that community becomes narrower and more extreme as it is unchecked by ideas from outside the closed universe of the ideological group’s “echo chamber.” The resulting polarization fosters intolerance of other ideas and generates extremism. . . .

Echo chambers are not good places to train lawyers. Lawyers work in environments that, unlike echo chambers, are cacophonous, where multiple competing ideas, assertions, arguments, and viewpoints abound and vie for attention and influence. Thus, law students need to learn how to be effective advocates in environments in which many competing viewpoints are present and in which they are trained to recognize, respect, and effectively deal with a plurality of diverse viewpoints. However, if some family law casebooks mirror the state of legal education today, some American law students are being trained in echo chambers.

Id. at 104–05 (footnotes omitted). For the conflict of laws course that the author prepared for Atlanta’s John Marshall Law School’s online American Legal Studies LL.M. program, he also prepared a specifically tailored, student-friendly course book, which is quite different in approach and presentation than the available casebooks on the market. See JEFFREY A. VAN DETTA, CONFLICT OF LAWS: PROBLEMS & SOLUTIONS—DOMESTIC & INTERNATIONAL CHOICE OF LAW FOR THE 21ST CENTURY GLOBAL ECONOMY (August 2009; revised and updated 2013–2014) (course book on file with the author).

¹⁹⁵ A curriculum guide is more extensive and more ambitious than a teacher’s “class notes” or “lesson plan” for a specific class meeting. Although the curriculum guide concept has not yet been much written about in legal education circles, the phrase is widely understood by educators at all levels to refer to, in the helpful words of a popular website, “a way of determining what to teach, how to teach it, and in what ways to teach material to diverse groups of students.” Tricia Ellis-Christensen, *What Is A Curriculum Guide?*, WISEGEEK, <http://www.wisegeek.com/what-is-a-curriculum-guide.htm> (last updated Feb. 6, 2014). Curriculum guides for

will become the basis for the facilitator's class notes and will ensure that even when facilitators for a course change, there is consistency in the facilitation to prepare students to complete their course deliverables and to adhere to the UPOs and UCOs.

6. Develop an Instructor's Guide that will explain to facilitators how each deliverable achieves specific UPOs and UCOs, and what the essential elements of the responses to each deliverable are. The Instructor's Guide will also provide suggestions for formulating individualized feedback on each assignment; students in an online program should receive individualized feedback on each submission at the time the facilitator posts a grade.

7. In developing the Instructor's Guide, a grading rubric for each assignment in each course should be developed. Grading rubrics are important to provide coherence in grading across the program, since there is no professional licensure examination to serve as a paradigm (e.g., as the bar examination is a licensure exam for a J.D. program).¹⁹⁶

course delivery must be distinguished for a similarly phrased, but quite different in function, appellation used by many law schools—the “Curriculum Planning Guide”—which, rather than being a teaching document, is a document directed at students that “assists students in planning their elective course of study after the first year.” *Curriculum Planning: Plan Your Course of Study*, GA. ST. U. C. L., <http://law.gsu.edu/students/1928.html> (last visited Feb. 6, 2014); see also William L. Andreen, *Curriculum Guide: A Guide to the Law School Curriculum*, U. ALA. SCH. L., <http://www.law.ua.edu/academics/curriculum/curriculum-guide/> (last visited Feb. 6, 2014) (“This Guide to the Law School Curriculum has been prepared by the Faculty of The University of Alabama School of Law to assist students who have completed one or more semesters of law school and find themselves faced with the difficult task of choosing among a host of elective courses.”).

¹⁹⁶ See, e.g., Jessica Clark & Christy DeSanctis, *Toward a Unified Grading Vocabulary: Using Rubrics in Legal Writing Courses*, 63 J. LEGAL EDUC. 3 (2013) (discussing the need for a uniform grading rubric for legal writing classes).

8. Develop appropriate capstone projects for 3-course sequences to be accomplished if Step I.B.2(d) is adopted.

II. Optimizing the Structure

A global forum program can be designed around 3-credit hour courses.¹⁹⁷ Each course is taken in a seven-week term. The course load might be optimized at one course per seven-week term for four reasons:

1. Each of the courses in the curriculum should involve a large component of reading and writing, the two most effective and efficient activities for foreign-educated lawyers to create a broad and deep understanding of American legal doctrine and method.
2. Each of the courses in the curriculum should have two live classroom sessions each week, consistent with both the dialogue that a global forum seeks to create and the enhanced learning that live, interactive online classroom sessions bring to distance learning students.¹⁹⁸ This design

¹⁹⁷ The author is indebted to Professor Lisa Taylor for her helpful insights on credit hour loads based on her experience in creating and facilitating the first course that entering students take in the online Employment Law LL.M. Degree program at Atlanta's John Marshall Law School. The author had initially intended to propose a load of 4 credit hours per course. Professor Taylor and the author discussed how our experiences in the Employment Law LL.M. program might inform my thinking about an online global forum program, including but not limited to how much time each week working lawyers can devote to studies. In light of this discussion, the author concluded it is more realistic to conceptualize each course for 3-credit hours. When an institution plans such a program, it is also wise to build in flexibility so that the model may be adapted to the realities experienced in delivering the course. Thus, in drafting courses for an online global forum program, the course creator should consider how to scaffold modular course content to permit the course to be offered in multiple iterations, e.g., in 2-, 3-, or 4-credit hour forms over a session of 5, 6, or 7 weeks' duration.

¹⁹⁸ In addition, live classroom sessions may become a benchmark in these kinds of programs in order to meet standards and expectations established by Florida Coastal Law School (FCLS) in its online U.S. legal studies LL.M. program, which heavily advertises that it includes live, interactive class

will require schools to enhance current online platforms (such as those that are Moodle-based¹⁹⁹) utilized by asynchronous programs²⁰⁰ in order to accommodate streaming an audio-video feed to students.²⁰¹ The level of functionality required is

sessions. See *About the Program*, *supra* note 146 (“Renowned U.S. Law professors from Coastal law and other accredited law schools provide a fundamental overview of U.S. Law, using cutting-edge technology that allows students to watch live and archived lectures, take quizzes, submit writing assignments, and interact with their professors.”). The school also posts on its website an extensive schedule of online class sessions across numerous time zones. See, e.g., *LL.M. in U.S. Law—Course Schedule—Winter 2013*, FLA. COASTAL SCH. L., <http://fcls.edu/sites/fcls.edu/files/Course%20Schedule%20-%20Winter%20LL.M.%202013.pdf> (last visited Feb. 6, 2014). FCLS’s marketing emphasizes that “Coastal Law’s LL.M. program is the first of its kind to offer all courses in an online, interactive classroom setting, [and that t]he live classes are scheduled for the convenience of working students, including weekend classes. Students can also watch taped lectures if they choose.” Press Release, Fla. Coastal Sch. of Law, Coastal Law Recruiting Students for Second Year of Online LL.M. Program for Foreign Lawyers (July 1, 2011) available at <http://www.reuters.com/article/2011/07/01/idUS214348+01-Jul-2011+BW20110701>.

¹⁹⁹ Moodle is “a Course Management System (CMS), also known as a Learning Management System (LMS) or a Virtual Learning Environment (VLE). It is a free web application that educators can use to create effective online learning sites.” MOODLE, <http://moodle.org/> (last visited Jan. 29, 2014).

²⁰⁰ While a number of asynchronous online courses and even entirely asynchronous online LL.M. programs are offered by American law schools, the asynchronous model is seen by some who have actually experienced it as amenable to improvement by the introduction of at least some synchronous instruction. See, e.g., Linda C. Fentiman, *A Distance Education Primer: Lessons From My Life as a Dot.Edu Entrepreneur*, 6 N.C. J.L. & TECH. 41, 61–64 (2004) (discussing certain problems encountered with a purely online, asynchronous law-school course).

²⁰¹ Moodle itself does not appear to present audio-video streaming as part of its platform, but other means apparently may be used to supplement Moodle’s platform to permit audio-video streaming. See, e.g., Roland Uknik, *Video (Audio) Streaming?*, MOODLE, <http://moodle.org/mod/forum/discuss.php?d=25640> (June 14, 2005, 6:25 PM). For example, Moodle’s website discusses an add-on module called Dimdim Web Meeting Activity, which is described as “the friendly Open Source web meeting. With Dimdim you can show Presentations, Applications and Desktops to any other person over the internet. You can chat, show your webcam and talk with others in the meeting. All this is possible without the attendees installing anything.” Rajesh

common today in many online educational programs, and has come to be expected by students.²⁰² Such personalized contact is especially

Dharmalingam, *Old Modules and Plugins*, MOODLE (Aug. 13, 2007, 11:24 PM), <http://moodle.org/mod/data/view.php?d=13&rid=932>. However, it appears that users who have tried to integrate Dimdim with Moodle have experienced problems. See Selva, Kumar, *Moodle Dimdim Integration Problems*, MOODLE (Sep. 13, 2011, 5:56 PM), <https://moodle.org/mod/forum/discuss.php?d=185541>. A better option might be to develop an integration with a matured, stable audio-visual webcast provider, such as Elluminate Live, which was acquired in 2010 by Blackboard.com. See Bill Flook, *Blackboard Buys Elluminate, Wimba*, WASH. BUS. J. (July 8, 2010, 11:22 AM), <http://www.bizjournals.com/washington/stories/2010/07/05/daily39.html>. See generally *About, BLACKBOARD COLLABORATE*, <http://www.blackboard.com/Platforms/Collaborate/Overview.aspx> (last visited Feb. 6, 2014). Additionally, Moodle advertises a module for compatibility with Elluminate. See *ElluminateLive Module*, MOODLE, http://docs.moodle.org/20/en/ElluminateLive_module (last updated Jan. 26, 2010). Another option for a provider is Breeze, which is used by mature, online universities, such as Kaplan University and America Intercontinental University Online. See generally JOHN GALLAGHER, *BREEZE MEETING® 5.0: GETTING STARTED* (July 15, 2005), available at http://www.indstate.edu/cirt/ittrain/resources/tutorials/instructional/breeze/Breeze_Meeting_Getting_Started.pdf (describing the use of Breeze at ground-based state universities); *Breeze Documentation*, ADOBE, <http://www.adobe.com/support/documentation/en/breeze/> (last visited Feb. 6, 2014) (providing hyperlinks to download Breeze's Installation and Configuration Guide and its complete documentation); *Macromedia Breeze: Guide to Web Meetings and Web Conferencing*, WEB-MEETINGS.ORG, <http://web-meetings.org/providers/breeze.html> (last visited Feb. 5, 2014) (describing the functions of Breeze). One further option for a provider is Adobe Connect, which is the latest technological successor to Breeze. See generally *Adobe Connect*, ADOBE, <http://www.adobe.com/products/adobeconnect.html> (last visited Feb. 5, 2014); *Breeze Resource Center*, ADOBE, <http://www.adobe.com/resources/breeze/> (last visited Nov. 16, 2013) (providing that Adobe no longer supports Breeze). While more expensive than open-source software, platforms such as Moodle, Breeze, and Adobe Connect justify their cost in functionality and reliability. It is critical for online courses to be supported by a very stable, very reliable webcast program, with appropriate technical support for students who experience either functional or operational difficulties. See, e.g., Oliphant, *supra* note 131, at 854–57; see also *Distance Education*, INSTRUCTIONAL TECHNOLOGY ALBANY L. SCH. (Nov. 6, 2007, 10:53 AM), <http://albanylawtech.wordpress.com/2007/11/06/distance-education/> (listing “hosting options” for online law-school courses).

²⁰² See, e.g., Gleason *supra* note 152; Oliphant, *supra* note 131, at 860–62; see also Richard A. Danner, *Strategic Planning for Distance Learning in*

important for a program, such as this, which endeavors to establish a global forum.

3. Each of the courses in the curriculum should have, of necessity, a broad spectrum of topics, each of which require an in-depth study to acquire the understanding and level of mastery needed for the lawyer to have working use of the doctrines and skills, as well as to develop and build a holistic perspective on the coursework, which maximizes the utility of the American legal perspective in the home-country work of an LL.M. student.

4. The author's experience in course design for, and teaching in, an online Employment Law LL.M. program has given him a heightened appreciation of the challenge that working attorneys have in studying at the graduate level while continuing their professional activities.²⁰³ Even with the benefit of an online platform, there are still practical limitations on the amount of reading, reflection, and writing that these working students can accomplish each week. Two features of a global forum can make realistic workload a heightened consideration. First, these classes should have one or two one-hour online class sessions each week. Second, due consideration must be made for the cultural and linguistic translations that foreign-educated attorneys must make to have competent comprehension of the language of American legal materials and the perspectives from which the American legal system operates. These considerations require a process of cross-lingual, cross-cultural translation that adds an

Legal Education: Initial Thoughts on a Role for Libraries, 21 LEGAL REFERENCE SERVICES Q. 69 (2002).

²⁰³ The author's appreciation for that challenge has been heightened further still by his own work towards an LL.M. degree with a specialization in Foreign and Comparative Law in the University of London's International Programs. See generally *LLM – Postgraduate Laws (LLM, Postgraduate Diploma and Postgraduate Certificate)*, U. LONDON INT'L PROGRAMMES, <http://www.londoninternational.ac.uk/llm> (last visited Feb. 6, 2014).

additional, and not insignificant, demand on the foreign-educated lawyer's time—a demand that is not present for the American-educated lawyers in English language LL.M. programs, either in the U.S. or abroad.²⁰⁴ Awareness of this challenge must be considered during course design, particularly with respect to designing learning activities and assessments.²⁰⁵

²⁰⁴ The academic literature bears this out in its discussion of the unique challenges faced by our colleagues in the Puerto Rican Bar, where, since 1898, the Spanish Civil Law tradition has had to accommodate an American common-law overlay and federal legal materials and proceedings in a second language (English) different from the lawyer's Spanish language training and practice. See, e.g., Valle v. Am. Int'l Ins. Co., 8 P.R. Offic. Trans. 735 (1979) (ruling that the application of common law doctrine to solve civil law problems is not permissible, emphasizing that issues of negligence, which arise under Article 1802 of the Puerto Rico Civil Code, are civil law issues); Liana Fiol Matta, *Civil Law and Common Law in the Legal Method of Puerto Rico*, 40 AM. J. COMP. LAW 783, 792 n.33 (1992) (noting the experience of Puerto Rican lawyers who are used to "double reasoning," i.e., "justify[ing] their conclusions, according to the fundamental concepts of both" the American common-law and the Spanish civil-law systems). Legal educators in Latin America have long recognized the value of immersing themselves in common law as the two legal traditions fuse to form a new hemispheric synthesis drawing from both traditions. See James P. White, *Dean Antonio Garcia-Padilla: A Leader in the Globalization of Legal Education*, 70 REV. JUR. U.P.R. 1025, 1030 (2001) ("As students from a mixed jurisdiction where the civil law tradition co-exists [sic] with common law institutions, the Puerto Rico students are in a position to better understand the processes of homologations or integration that are currently occurring within the Latin American legal systems.")

²⁰⁵ There is a small but growing body of literature on dealing with the challenges of "law in translations." See, e.g., Katerina P. Lewinbuk, *Can Successful Lawyers Think in Different Languages?: Incorporating Critical Strategies that Support Learning Lawyering Skills for the Practice of Law in a Global Environment*, 7 RICH. J. GLOBAL L. & BUS. 1 (2008); Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 INT'L J. LEGAL INFO. 396 (2007); Glen M. Vogel, *Language & Cultural Challenges Facing Business Faculty in the Ever-Expanding Global Classroom*, 11 J. INSTRUCTIONAL PEDAGOGIES 154 (2013); see also Julie M. Spanbauer & Katerina P. Lewinbuk, *Embracing Diversity through a Multicultural Approach to Legal Education*, 1 CHARLOTTE L. REV. 223 (2009); Susan Wawrose, *Academic and Cultural Support for International*

III. Training for Faculty

A training program for online teaching techniques will need to be developed for faculty members who have little or no prior online teaching experience. Online teaching involves more than typing and learning how to use the technical platform that is ultimately selected. Nor is online teaching merely a brick-and-mortar classroom approach transferred to a computer; it requires embracing a set of principles and educational concepts, as well as student expectations, that differ from those that many who teach exclusively in the brick-and-mortar classroom expect to permeate online law teaching.²⁰⁶ Until the courses are developed and the likely personnel—whether internal or external—are known, it is difficult to assess the training that will be required, but the requisite training is a topic a law school must consider carefully as the program is developed. In addition, it is difficult to preliminarily estimate the costs for faculty training program development. However, those faculty members who are trained can become long-term, highly-productive assets of the institution. As their knowledge, skill, and intuition for teaching online grows, so too does the quality of the educational endeavor.

LL.M. Students: Four Suggestions to Help Students Succeed, SOC. SCI. RES. NETWORK (December 15, 2012), <http://ssrn.com/abstract=2189830>.

²⁰⁶ See, e.g., Gregory C. Sales, *Preparing Teachers To Teach Online*, in INSTRUCTIONAL DESIGN: CONCEPTS, METHODOLOGIES, TOOLS & APPLICATIONS 8 (Kristin Klinger ed., 2011); David Covington, Donna Petherbridge & Sarah Egan Warren, *Best Practices: A Triangulated Support Approach In Transitioning Faculty To Online Teaching*, ONLINE J. DISTANCE LEARNING ADMIN. (2005), <https://www.westga.edu/~distance/ojdla/spring81/covington81.htm>. There is yet to grow a literature of substance on training law school faculty to transition from the physical classroom to the virtual. But see Robert J. Beck, *Teaching International Law as a Partially Online Course: The Hybrid/Blended Approach to Pedagogy*, 11 INT'L STUD. PERSP. 273 (2011); Lisa Penland et al., New Ways To Teach Drafting and Drafting Ethics (June 5, 2010), in 12 TRANSACTIONS: TENN. J. BUS. L. 187, 192–93, 194–99 (2011). What little is out there concerning law professors becoming trained to teach online further reflects the lack of a coherent literature or systematic approach. See, e.g., Jennifer Gresham et al., *Death—Planning for the Inevitable: A Hybrid Honors Course*, 8 HONORS PRAC. 43 (2012).

*C. Leveraging the Wide-Ranging Curricular Opportunities for the
Benefit of the Foreign-Educated Lawyer in an American Legal
Studies LL.M. Program*

Curriculum planning for global forum LL.M. programs for U.S. legal studies can assay a healthy variety of course opportunities that appeal to foreign-educated lawyers.²⁰⁷ Among these are, naturally, courses in U.S. intellectual property law; tort law (and tort reform) in the U.S.;²⁰⁸ drafting legal documents, including contracts; procedure in civil cases, particularly transnational (sometimes called “international”) civil litigation in U.S. courts and the unique U.S. approach to conflict-of-laws; commercial law, including but not limited to, international business transactions²⁰⁹ involving a U.S.-

²⁰⁷ Thinking about those opportunities can be well-informed by the wide variety of viewpoints from both L.L.M. program participants and professors. See e.g., *THE EXPORT OF LEGAL EDUCATION: ITS PROMISE AND IMPACT IN TRANSITION COUNTRIES* (Ronald A. Brand & D. Wes Rist eds., 2009).

²⁰⁸ Although not part of the original proposal, the author’s Atlanta’s John Marshall Law School colleague, Professor Liza Karsai, suggested adding a torts course to the global forum:

I would like to suggest that the global forum program include American torts. My experience dealing with foreign lawyers has been that they consider our tort law (including products liability and especially class action practice) to be surprising and extraordinary. I have also counseled companies who want to expand their product manufacturing and sales to the U.S. -- which often raises quite a number of concerns that would not come up in an expansion within Europe. I would be surprised if foreign lawyers in developing countries are not very curious about the American tort law system. . . . I merely make this suggestion based on my experiences dealing with a handful of lawyers in Canada, Australia, Germany and Holland, and my rare glimpses in the area of tort law in certain Middle Eastern countries.

E-mail from Liza Karsai, Assoc. Professor of Law, John Marshall Law Sch., to Jeffrey A. Van Detta, Assoc. Dean, John Marshall Law Sch. (Oct. 11, 2011) (on file with author). I am grateful to Professor Karsai for this incredibly valuable insight.

²⁰⁹ The term *international* in the title of three of these courses does not denote that the courses cover international or foreign law rather than American law. It would be misplaced to emphasize international law in an American legal studies program. International Civil Litigation and International Business Transactions I and II cover American law as

based party or otherwise subject to a U.S. law; U.S. workplace law; criminal justice, including criminal law, criminal procedure, and penal law itself; domestic relations law; U.S. tax law; and the rich panoply of constitutional law topics. These courses need to approach their subjects from a rather different perspective than typical J.D.

American law applies to transnational and international matters of trade and business, i.e., American law as it regulates parties and transactions of an international character but that have a substantial American component and perspective, and, as to the civil litigation course, an American forum as well. For example, an international business transactions course might survey the law applicable at the American end of those transactions, such as the following:

- (1) The U.S. treatment of the Convention on the International Sale of Goods (CISG), which is part of American federal law;
- (2) The Carriage of Goods by Sea Act (COGSA), a critical American shipping law;
- (3) The U.S. Foreign Corrupt Practices Act, which ensnares an increasing number of businesses who make bribe-like payments to foreign officials;
- (4) Article 5 of the Uniform Commercial Code, which regulates letters of credit issued by American banking institutions in international trade transactions;
- (5) The role of the United States government in regulating international business transactions, including import and export regulation, U.S. anti-boycott laws, U.S. Office of Foreign Assets Control sanctions, and U.S. export control laws; and
- (6) American corporations' adoption and implementation of voluntary codes of corporate ethics, such as the Organization for Economic Co-operation and Development's Guidelines for Multinational Enterprises.

An International Civil Litigation course is entirely about the U.S. federal courts and the issues under American law of personal jurisdiction from *International Shoe*, 326 U.S. 310 (1945), to *McIntyre v. Nicastro*, 131 S. Ct. 2780 (2011); subject matter jurisdiction under the alienage provisions of Article III, 28 U.S.C. § 1332, and 28 U.S.C. § 1350 (Alien Tort Statute); service of process (Fed. R. Civ. P. 4); conduct of discovery; enforcement of judgments (comity, as well as the Uniform Foreign Money Judgments Recognition Act); enforcement of forum selection and choice of law clauses by U.S. courts; enforcement of arbitration clauses in the U.S.; confirmation or vacatur of arbitral awards in the U.S. under The Federal Arbitration Act, 9 U.S.C. §§ 201–08; the forum non conveniens doctrine; and the U.S. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–11.

courses—they should be carefully crafted to anticipate and satisfy the needs and interests of the foreign-educated lawyer. From the author’s own work on such an LL.M. program, he offers examples of this kind of purpose-driven design and tailoring.²¹⁰

Any LL.M. program in American legal studies will include U.S. constitutional law among its subjects. In doing so for an online global forum program, a law school should avoid the kind of packed and dense survey course that is a staple of the J.D. education for American lawyers. Rather, schools should consider a format that is highly selective, in which content is chosen with particularity in order to foster a foreign-educated lawyer’s intensive study of aspects of the processes of decision making within the idiosyncratic framework provided not by only our federal founding document, but also our state constitutions. The tone of the course should be one of exploration and introspective examination by the foreign lawyers participating in the course, as well as by the faculty facilitating it. However, this explorative context has several implications.

First, the course envisioned is not one in constitutional law. Rather, it is one in “American constitutionalism,” which may seem at first blush to be a semantic distinction. Yet, on reflection, the name of the course bespeaks a difference in the perspective that the course offers, compared to the standard course in the subject. Unlike a course in constitutional law, a constitutionalism course focuses “on a dynamic political and historical process rather than as a static body of thought laid down in the eighteenth century.”²¹¹ Constitutionalism is, at its core, “conducting government under the provisions of a fundamental law,”²¹² and “thus avoids the static recital of the thought of the founding generation followed by the jarring leap to the late twentieth-century United States that characterizes much of contemporary constitutional” study.²¹³ The questions explored in American constitutionalism “range . . . beyond the confines of constitutional law” in traditional law school courses.²¹⁴ Central to

²¹⁰ See Jeffrey A. Van Datta, ATLANTA’S J. MARSHALL L. SCH., <http://www.johnmarshall.edu/facultystaff/jeffrey-a-vann-datta/> (last visited Jan. 25, 2014) (providing the author’s CV).

²¹¹ STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 5 (1996).

²¹² *Id.* at 6.

²¹³ *Id.* at 7.

²¹⁴ *Id.* at 4.

these questions is the notion, which makes constitutionalism such an attractive framework with which to open a conversation with American legal studies LL.M. participants in a global forum, that American constitutionalism “seeks to control democratic politics, something that is not easily controlled or influenced.”²¹⁵ Constitutionalism, therefore, is “a dynamic process [that] involves asking some basic questions”²¹⁶ that will help all of the participants in the conversation develop an understanding of “constitutional change that will situate the Constitution in the continuous flow of American” politics.²¹⁷

Second, the range of possibilities for using constitutionalism as the approach to an online LL.M. course is broad and inviting. As shown in Section II.D, *supra*, when we explored how we can construct an excellent dialogue around the rule of law using the career of Chief Judge Roy Moore, we can look to examples, such as a confrontational scenario involving the clash of state and federal judiciaries over the application of a commonly binding norm of the U.S. Constitution.²¹⁸ Similarly, using free materials readily available on the Internet, we may explore—to very useful effect—the ways in which American constitutionalism has handled clashes between executive and judicial power.²¹⁹ Consistent with that theme, the

²¹⁵ *Id.* at 6.

²¹⁶ *Id.*

²¹⁷ *Id.* at 7.

²¹⁸ See, e.g., Sanford Levinson, *So Much to Rewrite, So Little Time*, 27 Const. Comment. 515, 518-519 (2010-2011); Lawrence Lessig, Keynote Address: On What Being a (small r) Republican Means (Sept. 27, 2012), in 74 Mont. L. Rev. 37, 50 (2013); CALL A CONVENTION, <http://www.callaconvention.org> (last visited Feb. 6, 2014); *Leadership Team*, CALL A CONVENTION, <http://www.callaconvention.org/leadership> (last visited Feb. 6, 2014).

²¹⁹ The sequence of instruction that the author has designed as the basis for global forum dialogue about the executive-judicial clash includes multimedia material, drawn not only from familiar cases, but also from a variety of non-legal sources (including video media that contains an interview with a well-accomplished attorney, who later became a U.S. Supreme Court Justice, and an interview with a current Justice) that place the law in a context that limits the boundaries of power so that the participant can construct his or her own understanding of it. That sequence of instruction includes the following:

(1) Watch “Justice Stephen Breyer: Judges are Best to Enforce Rule of Law” (a five minute video). Brookings

Inst., *Justice Stephen Breyer: Judges are Best to Enforce Rule of Law*, YOUTUBE (Mar. 25, 2013), <https://www.youtube.com/watch?v=uEw0l37mEgs>.

(2) Watch “Justice Stephen Breyer: Rule of Law Is a Human Problem” (a three minutes video). Brookings Inst., *Justice Stephen Breyer: Rule of Law is a Human Problem*, YOUTUBE (Mar. 25, 2013), <https://www.youtube.com/watch?v=M7nUYbTxaW4>.

(3) Study *Glassroth v. Moore*, especially focusing on Sections I and VI of Judge Carnes’ opinion. *Glassroth v. Moore*, 335 F. 3d 1282 (11th Cir. 2003).

(4) Study *Cooper v. Aaron* by listening to the oral arguments, especially of advocate Thurgood Marshall, Esq., and studying the opinion. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Cooper v. Aaron*, OYEZ PROJECT IIT CHI.-KENT C. L., http://www.oyez.org/cases/1950-1959/1958/1958_1 (last visited Feb. 6, 2014).

(5) Watch the interview with then-attorney Thurgood Marshall (who argued *Cooper v. Aaron* to the Supreme Court, and who would later become a Supreme Court Justice) about the need for the President to use the persuasive power of his office to obtain compliance with the Supreme Court’s decisions. SecretMovies, *Lost Thurgood Marshall Interview with Mike Wallace*, YOUTUBE (Aug. 6, 2008), <https://www.youtube.com/watch?v=IoPLitU6jVg> (providing the interview in the first five minutes of the eight minute video)

(6) Study *United States v. Nixon* by listening to the July 8, 1974 oral argument, and then reading the Court’s opinion. *United States v. Nixon*, 418 U.S. 683 (1974); *United States v. Nixon*, OYEZ PROJECT IIT CHI.-KENT C. L., http://www.oyez.org/cases/1970-1979/1974/1974_73_1766 (last visited Feb. 6, 2014).

(7) Study the transition of executive power mediated by the judiciary in *Bush v. Gore* by listening to the Dec. 11, 2000 oral argument, and reading the Court’s opinion. *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Gore*, OYEZ PROJECT IIT CHI.-KENT C. L., http://www.oyez.org/cases/2000-2009/2000/2000_00_949/ (last visited Feb. 6, 2014).

(8) Study *Caperton v. A.T. Massey Coal Co.* by listening to the March 3, 2009 oral argument, and then reading the Court’s opinion. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009); *Caperton v. A.T. Massey Coal*

course would pick up on themes that do not form part of the usual law school classroom discourse on U.S. constitutional law. For example, the course should devote an entire unit to the study of state

Co., Inc., OYEZ PROJECT IIT CHI.-KENT C. L.,
http://www.oyez.org/cases/2000-2009/2008/2008_08_22
(last visited Feb. 6, 2014).

(9) Study *Rasul v. Bush* by listening to the April 20, 2004 oral argument and then reading the Court's opinion. *Rasul v. Bush*, 542 U.S. 466 (2004); *Rasul v. Bush*, THE OYEZ PROJECT AT IIT CHI.-KENT C. OF LAW, http://www.oyez.org/cases/2000-2009/2003/2003_03_334 (last visited Feb. 6, 2014).

(10) Highly recommended viewing:

(a) "The Constitution: That Delicate Balance." ReadYoConstitution, *The Constitution—That Delicate Balance—01—Executive Privilege and Delegation of Powers*, YOUTUBE (Mar. 16, 2013), <http://www.youtube.com/watch?v=2ulxvwLw6bk>.

(11) Recommended Reading:

(a) Students should study *Hamdan v. Rumsfeld* by listening to the March 28, 2006 oral argument, and then reading the Court's opinion. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdan v. Rumsfeld*, OYEZ PROJECT IIT CHI.-KENT C. L., http://www.oyez.org/cases/2000-2009/2005/2005_05_184 (last visited Feb. 6, 2014).

(b) Douglas Linder, *The Trial of Sheriff Joseph Shipp et al.: An Account*, U. MO.-KAN. CITY SCH. L. (2000), <http://law2.umkc.edu/faculty/projects/ftrials/shipp/trialaccount.html> (discussing the only U.S. Supreme Court criminal trial of a state sovereign's executive; here, a sheriff willfully disregarded an order from Justice Harlan directing the sheriff to protect the life of an African-American prisoner in his jail from local lynching mobs); see also *Famous American Trials: The Trial of Sheriff Joseph Shipp et al. 1907*, U. MO.-KAN. CITY SCH. L., <http://law2.umkc.edu/faculty/projects/ftrials/shipp/shipp.html> (last visited Feb. 5, 2014).

constitutions and their role, impact, and contemporary resurgence as an element of American constitutionalism.²²⁰ That unit also presents the opportunity to use a recent case study to evaluate some of the political fallout from state supreme courts that rely on state constitutions to change fundamental law in degrees well beyond what is possible under the federal constitution.²²¹ The course also devotes

²²⁰ Accessible and useful writings from scholars provide an excellent survey of the current ideas and movements arising from the actual—and potential—role of state constitutions in American constitutionalism. See, e.g., Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629 (2010); William N. Eskridge, Jr., *The California Proposition 8 Case: What is a Constitution for?*, 98 CALIF. L. REV. 1235 (2010); Judith S. Kaye, *A Double Blessing: Our State and Federal Constitutions*, 30 PACE L. REV. 844 (2010); Arthur Leavens, *State Constitutionalism: State-Court Deference or Dissonance?*, 33 W. NEW ENG. L. REV. 81 (2011); Sanford Levison, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813 (2010); Jeffrey A. Parness, *American State Constitutional Equalities*, 45 GONZ. L. REV. 773 (2010); Robert S. Peck, *For Trailblazers, When the U.S. Constitution is not Enough*, 45 NEW ENG. L. REV. 855 (2010); G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 MONT. L. REV. 7 (2011).

²²¹ Participants are asked to read *Varnum v. Brien* and then listen to a seven-minute speech, while reading accompanying notes, by former Iowa Supreme Court Chief Justice Marsha Ternus (who was, after that decision, ousted by Iowa voters in a retention election). *Varnum v. Brien*, 763 N.W. 2d 862 (Iowa 2009); JFK Library, *2012 Profile in Courage Award Recipient—Iowa Supreme Court Chief Justice Marsha Ternus*, YOUTUBE (May 10, 2012), <https://www.youtube.com/watch?v=isZL6FPStX4>. Participants should also watch Marsha Ternus's interview with Phil Ponce. See Marsha Ternus, CHI. TONIGHT (Feb. 27, 2013, 11:00 AM), <http://chicagotonight.wttw.com/2013/02/27/marsha-ternus>. Students should then examine writings that discuss the Iowa Supreme Court's experience in state constitutionalism through the *Varnum* case. See, e.g., Ian Bartrum, *Constitutional Rights and Judicial Independence: Lessons from Iowa*, 88 WASH. U. L. REV. 1047 (2011). To form a contrast for discussion, the participants should then study a state supreme court's decision to declare unconstitutional its own state's statute criminalizing consensual sodomy between adults, which the U.S. Supreme Court declined to do. After listening to the oral argument in the U.S. Supreme Court students should then compare *Bowers v. Hardwick* with *Powell v. State* and set these cases into the broader dialogue over whether and how state constitutions should be used to recognize individual rights not recognized under the federal

a unit to a cutting-edge realm of constitutionalism—the use of the Internet (a spreading movement, spearheaded by, Professors Lawrence Lessig and Sanford Levinson among others)—to convene a constitutional convention and to hold unofficial constitutional conventions around the country in order to foment a rising popular tide to call for official conventions.²²² The flavor of the American

Constitution. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); see *Bowers v. Hardwick*, OYEZ PROJECT IIT CHI.-KENT C. L., http://www.oyez.org/cases/1980-1989/1985/1985_85_140 (last visited Feb. 4, 2014); see also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Stephen Kanter, *Sleeping Beauty Wide Awake: State Constitutions as Important Independent Sources of Individual Rights*, 15 LEWIS & CLARK L. REV. 799 (2011); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); Robert F. Williams, Response, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901 (2011). Participants must then complete the unit by viewing an American Constitution Society video of the Panel on Judicial Independence. American Constitution Society, *Judicial Independence in Peril?*, YOUTUBE (Aug. 24, 2011), <https://www.youtube.com/watch?v=bZmWrCBs4Q0> (featuring former Chief Justice Tarnus of Iowa and the legendary former West Virginia Supreme Court Justice, Richard Neely).

²²² Participants are asked to begin by exploring the Call a Convention website. See CALL A CONVENTION, <http://www.callaconvention.org/> (last visited Feb. 6, 2014). As part of that exploration, participants should watch Professor Lessig's fifty-seven minute video, "Rootstriking." Lessig, *Rootstriking*, YOUTUBE (Sept. 25, 2011), <http://www.youtube.com/watch?v=4gpbfY-atMk>. Students then are directed to readings from the most current literature on this movement. See, e.g., John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395 (2010); Tom Ginsburg et al., *When to Overthrow Your Government: The Right to Resist in the World's Constitutions*, 60 UCLA L. REV. 1184 (2013); Sanford Levinson, *Reconsidering the Modern Hanoverian King*, 36 HARV. J.L. & PUB. POL'Y 63 (2013); Sanford Levinson, *So Much to Rewrite, So Little Time . . .*, 27 CONST. COMMENT. 515 (2011); Ann M. Lousin, *Essay: How to Hold a State Constitutional Convention in the Twenty-First Century*, 44 LOY. L.A. L. REV. 603 (2011); Michael Stokes Paulson, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL'Y 837 (2011); Michael C. Dorf, Book Review, 122 POL. SCI. Q. 663 (2008) (reviewing SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006)).

constitutionalism course provides different perspectives from which participants can observe the same phenomena and examine not the U.S. Constitution as a document model,²²³ but American constitutionalism as a dynamic process. The same observable processes within contemporary American society are brought to other courses the author has designed for his institution's online American Legal Studies Program.²²⁴

The distinctive perspectives and objectives of a global forum program having been extrapolated from the discussion of the philosophy animating such a program and of courses within it,²²⁵ we next endeavor to help the reader situate the global forum concept within the existing LL.M. program landscape of American legal education in the twenty-first century.

1. A GLOBAL FORUM'S NICHE IN AMERICAN LEGAL EDUCATION

An online global forum is quite distinct from any other program currently offered at most American law schools.²²⁶ That fact becomes apparent when one surveys LL.M. programs marketed to foreign lawyers. Many of these LL.M. programs treat the study of

²²³ E.g., David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

²²⁴ See Curriculum, LL.M. in American Legal Studies—Online, ATLANTA'S JOHN MARSHALL L. SCH., <https://www.johnmarshall.edu/llm/llm-in-american-legal-studies-online/curriculum/> (last visited Feb. 6, 2014).

²²⁵ To which the author would add the interesting potential for systemic critiques of other aspects of American law highlighted in two recent books: THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW, (F.H. Buckley ed., 2013) and JAMES R. MAXEINER, GYOOHO LESS & ARMIN WEBER, FAILURES OF AMERICAN CIVIL JUSTICE IN INTERNATIONAL PERSPECTIVE (2011). In addition, of course, American criminal law, criminal procedure, and prison or penal law, cry out for similar critical and multi-perspective examinations. See, e.g., Patrice A. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 WASHBURN L.J. 589 (2012); Johnathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513 (2012).

²²⁶ The University of Idaho Law School has assembled a master list of web links providing all "the accredited law schools in the U.S. and Canada offering LL.Ms, SJDs, and other advanced law degrees," but not certificate programs. *College of Law Degree*, UNIV. OF IDAHO C. OF L., http://www.law.uidaho.edu/LLM_programs (last updated Nov. 1, 2013).

American law as an exercise in comparative law,²²⁷ with an academic emphasis, rather than a practical legal studies orientation—even those programs that label themselves as “global.”²²⁸ Many other

²²⁷ See, e.g., *Kent College of Law L.L.M. Program*, ITT CHI.-KENT SCH. OF L., <http://www.kentlaw.edu/international/llm/iclaw/> (last visited Feb. 6, 2014) (The LL.M. Program in International and Comparative Law is a one-year, full-time program for foreign lawyers who wish to gain a broader understanding of the American Legal System and international legal issues.). See also Marie Winfield-Pust, *The LL.M. in Comparative Law: Why this Field of Law Continues to Appeal to Legal Academics and Practitioners Alike*, LLM GUIDE: MASTERS OF LAWS PROGRAMS WORLDWIDE (June 15, 2009), <http://www.llm-guide.com/article/420/the-llm-in-comparative-law>.

²²⁸ See e.g., *The Center for International Law L.L.M. in U.S. Legal Studies*, JOHN MARSHALL L. SCH., <http://www.jmls.edu/academics/international/llm-global-legal-studies.php> (last visited Feb. 5, 2014). It emphasizes that this program is for foreign lawyers only. See *id.* Of this program, Chicago’s John Marshall says:

The John Marshall Law School's LLM Program in Global Legal Studies satisfies the needs of two applicant groups. First, John Marshall provides a flexible program for those wishing to deepen their knowledge of specific areas of law, yet who either cannot find a graduate program focusing on those areas, or find such programs too restrictive in possible course selection. Second, John Marshall provides an expansive curriculum in United States and international law for those wishing to broaden their scope of legal knowledge.

Many graduate programs in law permit students to take only a few courses outside a tightly-defined subject area. Although this arrangement is fine for the specialist who has found the perfect program, it may be too restrictive for many lawyers who wish to pursue graduate studies. In particular, those who wish to study a defined subject in law, yet want the freedom to take a number of other courses, will find John Marshall's program of interest.

In John Marshall's LLM Program in Global Legal Studies, students are permitted to choose from a large selection of courses in United States and international law, combining them in a way that suits each student's individual interests and abilities. This is possible because each student, with the approval of the Program's Director and Associate Director, is free to choose from almost the full range of John Marshall's extensive undergraduate and graduate law curricula. Since The

global LL.M. programs target a specific concentration, such as the very popular “global law and health” variety of LL.M. degrees.²²⁹ These programs are not distance education programs; they are entirely “on campus.”

Of the many distance education programs for LL.M. degrees,²³⁰ the first online American Legal Studies LL.M. program to be rolled

John Marshall Law School is one of the largest law schools in the United States, those curricular offerings are likewise large.

Thus, one graduate student might concentrate on labor and employment law; another, on U.S. constitutional law and individual human rights; yet a third, on commercial and international business law. In pursuit of these concentrations, each student would be required to take Introduction to the U.S. Legal System, Comparative Legal Studies, and Lawyering Skills for Foreign Lawyers, the LL.M. Program's three required courses. Each student would consult with the Director to design an individual schedule of additional courses in his or her chosen field.

LL.M. Program in Global Legal Studies, JOHN MARSHALL L. SCH., <http://www.jmls.edu/academics/international/llm-global-legal-studies.php> (last visited Feb. 5, 2014); *see also Foreign Graduates LL.M.*, CASE W. RESERVE U., <http://www.case.edu/law/llm/> (last visited Feb. 6, 2014).

²²⁹ *See e.g., Global Health Law LL.M.*, GEORGETOWN L. SCH., <http://www.law.georgetown.edu/academics/academic-programs/graduate-programs/degree-programs/global-health/index.cfm> (last visited Feb. 6, 2014); *Global Law and Technology*, SUFFOLK U. L. SCH., <http://www.suffolk.edu/law/academics/degrees/llm/21768.php> (last visited Feb. 6, 2014).

²³⁰ *See* Karen Sloan, *Online Master of Laws Programs Proliferate at Traditional Law Schools*, NAT'L L. J., (May 4, 2010), *available at* <http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202457594351&slreturn=20140029105243> (identifying LL.M. programs at New York University School of Law (executive LL.M. in tax); the University of Alabama School of Law (LL.M. online concentrations in taxation, and business transactions); Boston University School of Law, Loyola Chicago (LL.M. in health law, both on campus and online); Southwestern School of Law (LL.M. in entertainment and media law); and FCSL (LL.M. in U.S. law, a program designed for international studies). There are also online LL.M. programs at Western New England College of Law (estate planning and elder law); Thomas Jefferson Law School (LL.M. and J.S.M. in international tax, financial services); University of Miami School of Law (LL.M. in real property development, on campus or online); Vermont Law

out by an ABA-approved law school was at Florida Coastal School of Law (FCSL) when it offered an online LL.M. in American Legal Studies. Incepted in 2010, the FCSL program awarded students with a LL.M. in “U.S. Law” and welcomed its second class of foreign-educated lawyers in the Fall of 2011.²³¹ However, the FCSL program presented is quite different from the global forum program described in this Article.²³² The FCSL program emphasizes breadth over depth by attempting to combine the scope of bar-study courses satisfying the New York State Bar or proposed ABA Model Rule and Qualifying LL.M. criteria with a survey model as if it aspired to become a bar examination credentialing diploma.²³³ However, that aspiration, though most worthy, appears nipped in the bud by the New York Court of Appeals Rule 520.6 and the qualifying criteria proposed with the ABA’s Model Rule, which do not credit courses

School (LL.M. in environmental law); Stetson University College of Law (LL.M. in elder law); Thomas E. Cooley School of Law (LL.M. in intellectual property law); and the John Marshall School of Law (with an entire division devoted to offerings from their ground-based intellectual property law and information technology & privacy law LL.M. programs, and to offering an entire employee benefits LL.M. degree online)). Northwestern Law offers a hybrid campus and online executive LL.M. degree program, culminating in an LL.M. from Northwestern and a certificate in business administration from the IE Law School, located in Madrid, Spain. *See IE Law School*, LLMGUIDE: MASTER LAWS PROGRAMS WORLDWIDE, <http://www.llm-guide.com/university/227/ie-law-school> (last visited Feb. 6, 2014); *IE Law School - Northwestern Law Executive L.L.M. Program*, TOP-LAW-SCHOOLS.COM, <http://www.top-law-schools.com/exllm.html> (last updated Apr. 2010). *See generally Executive LL.M.*, NORTHWESTERN U. SCH. L., <http://www.executive-llm.ie.edu/> (last visited Feb. 6, 2014); IE L. SCH., http://www.ie.edu/IE/site/php/en/school_law.php (last visited Feb. 6, 2014). Similarly, Boston University’s Law School offers a hybrid Executive LL.M. in international business law. *See Executive LL.M. in International Business Law*, BOS. U. SCH. L., <http://www.bu.edu/law/prospective/llm/intlbuslaw/> (last visited Feb. 6, 2014). Chapman University School of Law offers a hybrid LL.M. program in Prosecutorial Science for active prosecutors who are admitted to the California Bar. *See LL.M. in Prosecutorial Science*, CHAPMAN U. FOWLER SCH. L., <http://www.chapman.edu/law/academic-programs/llm/prosecutorial-science.aspx> (last visited Feb. 6, 2014).

²³¹ *See id.*

²³² *See Curriculum: LL.M. Masters of U.S. Law*, FLA. COASTAL L. SCH., <https://fcsl.edu/us-law-llm/curriculum> (last visited Feb. 6, 2014).

²³³ *See id.*

delivered online toward the required credits composing a bar-exam qualifying LL.M. program.²³⁴ The kind of global forum proposed in this Article builds on the intensive study of particular contemporary, cutting-edge American legal subjects, highly relevant to foster dialogue between foreign-educated lawyers and their American professors.²³⁵ This concept was adopted at the author's home institution when it became the second ABA-approved law school to offer an online LL.M. program devoted to U.S. Legal Studies.²³⁶

²³⁴ See Jeffrey A. Van Detta, *supra* note 9.

²³⁵ FCSL's LL.M. program, by contrast, consists of having students take as many two-credit courses as possible, emphasizing breadth over depth. In fact, it looks very much like a "highlights" tour across FCSL's curriculum. It is not surprising that the FCSL program has a "bar-review" ambience about it, since FCSL has, at times in the past, presented the program as one that qualifies its graduates to sit for state bar examinations. While FCSL's online LL.M. program is quite distinct from the John Marshall Law School Global Forum program, FCSL's program serves an important function—it confirms our anecdotal experience that there is a strong market among foreign-educated lawyers for distance learning in American legal subjects. For example, FCSL's first class in 2010 enrolled 47 students from 13 countries "all graduates of foreign law programs, enrolled from Japan, Korea, Singapore, Hong Kong, Australia, United Arab Emirates, France, Italy, Germany, Austria, Mexico, Canada, and Guyana," as well as "U.S. residents who obtained their first degree in law from outside of the U.S." *Coastal Law Recruiting Students for Second Year of Online LL.M. Program for Foreign Lawyers*, *supra* note 149. Since FCSL rolled out its program in 2010, the second law school to roll out an online American legal studies LL.M. degree program was the author's institution, for which he was the reporter and consultant. See REPORT OF PROFESSOR JEFFREY A. VAN DETTA REGARDING A PROPOSAL TO ESTABLISH AMERICAN LEGAL STUDIES LL.M. DEGREE PROGRAMS FOR FOREIGN-EDUCATED LAWYERS AT AJMLS, JOHN MARSHALL LAW SCH., (November 3, 2011) [hereinafter VAN DETTA REPORT] (copy on file with the author).

²³⁶ The author served as the Reporter to the faculty and administration of Atlanta's John Marshall Law School (AJMLS) charged with researching and assessing the various requirements and standards, trends and developments, and subject-matter content for a Qualifying LL.M. Program and an Online American Legal Studies LL.M. Program. The faculty adopted the author's Proposal in January 2012. The institution then sought, and received, acquiescence from the ABA Section on Legal Education in July 2012 to offer the LL.M. programs. See VAN DETTA REPORT, *supra* note 235; see also *AJMLS Launches Online, Resident LL.M. Programs for Foreign-Educated Attorneys*, ATLANTA'S JOHN MARSHALL LAW SCH., (July 3, 2012),

Since that time, several other ABA-approved law schools have announced online LL.M. programs in U.S. Law or American Legal Studies, but they have chosen to follow the FCSL path rather than a global forum approach.²³⁷

<http://www.johnmarshall.edu/2012/07/atlas-john-marshall-law-school-launches-online-resident-ll-m-programs-for-foreign-educated-attorneys/>.

²³⁷ See, e.g., *LL.M. Programs*, REGENT U. SCH. L., <https://www.regent.edu/acad/schlaw/programs/lm/> (last visited Feb. 7, 2014) (declaring the availability of an LL.M. in American legal studies; on campus or online); *WUSTL Academic Overview*, WASH. U. ST. LOUIS SCH. L., <http://onlinelaw.wustl.edu/academics/academic-overview/> (last visited Feb. 7, 2014) (declaring the availability of an LL.M. in U.S. law). Like FCSL's program, Regent's online LL.M. program seems to emphasize breadth over depth, and appears similar in content to a bar-preparation LL.M. program. See *LL.M. American Legal Studies: Courses*, REGENT U. SCH. L., <https://www.regent.edu/acad/schlaw/programs/lm/alscourses.cfm> (last visited Feb. 6, 2014). Somewhat more surprisingly, Washington University's program also seems to be laid out along the lines of a bar-qualifying LL.M. program, rather than a global forum, and it even boasts the following claims:

Washington University School of Law recognizes many lawyers abroad require an advanced legal degree in order to accomplish their academic and professional goals. Washington University's LL.M. in U.S. Law for Foreign Lawyers program has a student body drawn from diverse legal cultures who bring knowledge of their home business and legal environments into the classroom. The @WashULaw LL.M. program allows Washington University to reach many more highly qualified students who are unable to relocate to the United States or require more flexibility while honoring their current commitments in their respective countries of residence. It is an ideal environment for experienced attorneys and recent law graduates alike who desire to pursue advanced studies in U.S. law or intend to sit for a U.S. bar examination.

WUSTL Academic Overview, supra. Of course, given the position of the most LL.M.-friendly and most sought-after jurisdiction for bar examination by foreign lawyers—New York—it is surprising a law school of Washington University's self-image would make such a broad, and potentially confusing, statement to applicants in light of New York's absolute bar to online LL.M.'s as a qualifying criterion. Review the WUSTL website's "Rankings and Reputation" page, for any foreign lawyer who may be unfamiliar with those attributes of WUSTL. *WUSTL Rankings*, WASH. U. ST. LOUIS SCH. L.,

An online global forum program would be founded with a distinct and distinguishing ideal—one that serves the promotion of the rule of law as a way of life, a need that world events continue to prove grows every day in its urgency. Yet, a global forum program also offers another highly useful purpose. While both the New York Court of Appeals Rule 520.6 and the qualifying criteria proposed with the ABA's Model Rule do not credit courses delivered online toward the required credits composing a bar-exam qualifying LL.M. program, there is another very crucial role that an online program may play. Such a global forum program allows foreign-educated lawyers to become familiar with fundamental principles and ideas of American law. It also allows them to make a considered and well-informed choice as to whether they wish to seek admission to the bar of a U.S. state and are prepared, therefore, to undertake the kind of financial planning required to leave their current law practice abroad to further pursue their education in a ground-based U.S. law school American Legal Studies LL.M. program. Thus, online legal education can play a crucial role in informed consumer choice and in drawing potential qualifying LL.M. program students from the ranks of practicing foreign lawyers.²³⁸

<http://onlinelaw.wustl.edu/about/llm-rankings/> (last viewed Feb. 6, 2014). One non-ABA, California Bar Examiners-accredited school, the John F. Kennedy University College of Law in the San Francisco Bay Area, now offers its own LL.M. in United States legal studies in an online and on campus iteration. *LL.M. in United States Legal Studies*, *supra* note 163. Referring to its online LL.M. degree, the John F. Kennedy University College of Law flatly states, “[o]nce graduating with the LL.M., a student will qualify to sit for the California Bar Examination.” *Id.* Of course, this may be over-simplifying a somewhat more complicated situation in California, unless the College has some kind of written commitment from the Board of Bar Examiners regarding the acceptability of an online LL.M. as a bar-credentialing qualification. See Jeffrey A. Van Detta, *supra* note 9.

²³⁸ The use of an online program, like a global forum program, also serves an important “unbundling” function—allowing foreign-educated lawyers to gain knowledge of U.S. law without having to uproot family and career to go abroad for study of U.S. law unless or until they desire admission to a state bar in the U.S. Unbundling has been argued by some observers to be an essential component of, and the next evolutionary stage in, the evolution of legal education in the twenty-first century. See William K.S. Wang, *The Restructuring of Legal Education Along Functional Lines*, 17 J. CONTEMP. LEGAL ISSUES 331, 337–46 (2008). As Mr. Wang aptly observes:

V. SUMMING IT ALL UP IN A VISION FOR TOMORROW

The time is upon us when the power of the Internet as the principal medium for revolutionizing the delivery of higher education is demonstrated year after year. As the most tradition-bound of disciplines, the law has lagged behind other disciplines in making use of the most powerfully democratizing force in the history of education. Resistance has emanated largely from uninformed stereotypes of online education as well as on the rarity of the skills required for online teaching among many in the legal academia who have never sought to immerse themselves into a radically new student-centered pedagogy. Slowly, but inexorably, the world of legal education, both in the U.S. and abroad, is being confronted with the reality that new generations of learners are coming to the study of law with the expectation of increasing emphasis on the use of online education as *a*—and one day, *the*—primary delivery medium.

Whether ready or not, American legal education will be vaulted into the online world as its consumers ramp up their demand for it and demand the associated cost and convenience savings that it affords. American institutions of higher learning are increasingly turning to growing student populations in the developing world as their principal growth market. As they continue to do so with increasing rapidity, they will find a world growing desirous for the

The flexibility of the new system would be a boon to many individuals who presently have difficulty obtaining a legal education. Poor individuals would find it much easier to earn a law school degree gradually while simultaneously holding a job. Many older men and women who have been frustrated by their lack of law school education also would have the opportunity to study conveniently for a degree. Another important benefit to everyone of the restructured system would be the ease of continuing education throughout one's career.

Id. at 346. In addition, using an online education to supplement ground-based programs has become well-established in legal education. *See, e.g.,* Powell, *supra* note 139; *see also* Marie Stefanini Newman, *Not the Evil Twin: How Online Course Management Software Supports Non-Linear Learning in Law Schools*, 5 J. High Tech. L.J. 183, 187–99 (2005); Berg, *supra* note 137; Robert M. Lloyd, *Investigating a New Way to Teach Law: A Computer-Based Commercial Law Course*, 50 J. Legal Educ. 587, 590 (2000) (explaining that students feel more comfortable expressing opinions online than in traditional classes).

opportunity to study American law. Similarly, as developing countries, assisted by computer entrepreneurs, undertake major initiatives to put mobile computing, such as tablets, into the hands of every student in their domains,²³⁹ the resulting market forces and consumer preference will compel American law schools to redefine their presence as hybrid institutions with programs that offer a choice between ground-based and online-based platforms, with the added ability to permit students to enjoy free transfer and course mix between these platforms.²⁴⁰

²³⁹ The idea for universal computing is here and being acted upon, even if some patience is called for in order to be effectuated successfully. See, e.g., Pamposh Raina, Ian Austen & Heather Timmons, *An Idea Promised the Sky, but India Is Still Waiting*, N.Y. TIMES, Dec. 29, 2012, at BU1 (“The idea was, and still is, captivating: in 2011, the Indian government and two Indian-born tech entrepreneurs unveiled a \$50 tablet computer, to be built in India with Google’s free Android software. The government would buy the computers by the millions and give them to its schoolchildren.”); Ian Austin, *From Montreal, DataWind Says Aakash Not Main Focus*, N.Y. TIMES (Dec. 31, 2012, 5:40 AM), <http://india.blogs.nytimes.com/2012/12/31/from-montreal-datawind-says-aakash-not-companys-main-focus/?ref=technology> (“The company’s real goal, according to [Raja Singh] Tuli [co-founder of DataWind], is ‘to supply low-cost Internet to the masses in India and Africa.’”). After a somewhat shaky start, DataWind in late 2013 appears to be hitting its stride. See, e.g., Darrell Etherington, *Datawind’s Sub-\$50 Android Tablet Hitting the UK Soon, Next-Gen Device Matches iPad Specs on Paper*, TECHCRUNCH, (Oct. 18, 2013), <http://techcrunch.com/2013/10/18/datawinds-sub-50-android-tablet-hitting-the-uk-soon-next-gen-device-matches-ipad-specs-on-paper/> (noting that “[A]t Wired’s 2013 London event[,] Datawind CEO Suneet Tuli revealed that so far, the company has shipped around 1 million low-cost tablets, with plans in the pipeline that could see them increase that number exponentially both in India and in other developing markets around the world”); Apurva Chaudhary, *Datawind To Offer Educational Content On Tablets With TES India Tie-up*, MEDIANAMA, (Sept. 18, 2013), <http://www.medianama.com/2013/09/223-datawind-to-offer-educational-content-on-tablets-with-tes-india-tie-up/> (“Datawind, widely known as the maker of Aakash tablet, has tied up with TES India, an online teaching community, to preload educational content to its tablets.”). See also Pamposh Raina, *Inside DataWind’s India Operations*, N.Y. TIMES (Jan. 9, 2013, 6:04 AM), <http://india.blogs.nytimes.com/2013/01/09/inside-datawinds-india-operations/>.

²⁴⁰ In December 2013, the ABA Section on Legal Education granted a variance in the ABA accreditation standards that will allow William Mitchell College in St. Paul, Minnesota, to offer a hybrid four-year J.D. program that

As discussed earlier, an important step in that inevitable evolution is the creation of online forums for the study of American law. Those “global forums,” in the form of online LL.M. degree programs as well as other kinds of programs, will effectuate the dual purposes of contributing to the global effort to re-define the rule of law for our age and of introducing to foreign-educated law students and lawyers the study of American law in a collaborative, virtual setting. Whichever of the many current definitions of the rule of law one subscribes to, the Internet promises to do for the rule of law concept what the Bering Land Bridge did for the human journey.²⁴¹

includes a large component of online coursework. See Victor Li, *Law School's Online-Hybrid Degree Program Gets First-Ever Approval from ABA*, ABA J. ONLINE, http://www.abajournal.com/news/article/william_mitchell_online-hybrid_law_school_program/ (last visited Feb. 11, 2014). The program is set to take in its first class of students in Fall 2015. *Id.*

²⁴¹ See THE BERING LAND BRIDGE 373–450 (David M. Hopkins, ed., 1967); see also Wolfgang Saxon, *David Hopkins, 79, Authority on Land Bridge of First Ice Age*, N.Y. TIMES (Nov. 14, 2001), <http://www.nytimes.com/2001/11/14/us/david-hopkins-79-authority-on-land-bridge-of-first-ice-age.html>.